(1)

No. 96-6867-CFH Title: Joseph Roger O'Dell, III, Petitioner
v.
CAPITAL CASE J. D. Netherland, Warden, et al.

Docketed: Court: United States Court of Appeals for
November 27, 1996 the Fourth Circuit

Entry	Date	Proceedings and Orders
	Nov 26 1996	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due December 27, 1996)
	Dec 4 1996	Brief of respondent J.D. Netherland, Warden, et al. in opposition filed.
	Dec 11 1996	Application (A96-424) for a stay of execution, submitted to The Chief Justice.
	Dec 11 1996	Reply brief of petitioner Joseph O'Dell filed.
	Dec 12 1996	Supplemental brief of respondent J.D. Netherland, Warden, et al. filed.
	Dec 16 1996	Application (A96-424) referred to the Court by the Chief Justice.
	Dec 17 1996	Application (A96-424) granted by the Court.
	Dec 17 1996	(A96-424) The application for stay of execution of sentence of death presented to the Chief Justice and by him referred to the Court is granted pending the disposition by this Court of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.
	Dec 19 1996	Petition GRANTED. Limited to Questions 1 and 2 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, January 30, 1997. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, February 27, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 12, 1997. Rule 29.2 does not apply. Statement by Justice Scalia respecting the grant of certiorari. SET FOR ARGUMENT March 18, 1997. **********
	Jan 17 1997	Joint appendix filed.
	Jan 24 1997	Record filed.
	Jan 30 1997	Brief of petitioner Joseph O'Dell filed.
	Feb 5 1997	Record filed.
	Feb 20 1997	CIRCULATED.
	Feb 25 1997	Motion of petitioner for appointment of counsel filed.
	Feb 26 1997	DISTRIBUTED. March 14, 1997
	Feb 26 1997	Brief of respondents J.D. Netherland, Warden, et al. filed.
	Mar 12 1997	Reply brief of petitioner filed.
	Mar 17 1997	Motion for appointment of counsel GRANTED and it is ordered that Robert S. Smith, Esquire, of New York, New

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No. 96-6867-CFH

Entry	Date	Proceedings and Orders
		York, is appointed to serve as counsel for the petitioner in this case.
	Mar 18 1997	ARGUED.

(2)

No. 96- ORIGINAL

In the Supreme Court of the United States

October Term, 1996

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

J.D. NETHERLAND, Warden, Mecklenburg Correctional Center; RONALD J. ANGELONE, Director, Virginia Department of Corrections; JAMES S. GILMORE, III, Attorney General of the Commonwealth of Virginia; COMMONWEALTH OF VIRGINIA,

Respondents.

96-6867

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

IMMINENT EXECUTION SCHEDULED FOR DECEMBER 18, 1996

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November 26, 1996

CAPITAL CASE

QUESTIONS PRESENTED

1. Did this Court's decision in *Simmons* v. *South Carolina*, 114 S. Ct. 2187 (1994)—which recognized that when a prosecutor seeks to establish future dangerousness before a capital sentencing jury, due process entitles the defendant to rebut by presenting information regarding his parole ineligibility—constitute a "new rule" within the meaning of *Teague* v. *Lane*, 489 U.S. 288 (1989), which cannot be retroactively applied to prior state-court convictions?

2. Does this Court's decision in *Simmons* fall within the second exception to *Teague*, which allows for the retroactive application of procedural rules that protect the fundamental fairness and accuracy of criminal proceedings?

3. Does DNA evidence that undermines the sole credible evidence supporting a capital conviction establish a claim of actual innocence under *Schlup* v. *Delo*, 115 S. Ct. 851 (1995)?

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PETITION FOR A WRIT OF CERTIORARI

Joseph Roger O'Dell, III respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the *en banc* court of appeals are reported at 95 F.3d 1214 and 1255. (App. 1a and 83a.) There is no panel decision of the court of appeals. The opinion of the district court granting O'Dell's habeas petition in part and denying it in part is not officially reported. (App. 99a.)

JURISDICTION

On September 10, 1996, the court of appeals entered judgment reversing the district court's order to the extent it granted habeas relief and affirming it to the extent it denied habeas relief. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In addition, it involves the Code of Virginia § 53.1-151(B1). The text of these provisions is set forth at pages 181a - 186a of the Appendix.

STATEMENT OF THE CASE

A. The Decision of the Court of Appeals

On September 10, 1996, the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, by a vote of 7-6, entered judgment reversing the district court's order to the extent it granted habeas relief to O'Dell and invalidated his death sentence, and affirming it to the extent it denied habeas relief on O'Dell's conviction. 95 F.3d 1214. (App. 1a.) The majority opinion was authored by Judge Luttig and joined by Chief Judge Wilkinson and Judges Russell, Widener, Wilkins, Niemeyer and Williams. The minority opinion, dissenting in part and concurring in part, was authored by former Chief Judge Ervin and joined by Judges Hall, Murnaghan, Hamilton, Michael and Motz.

The court of appeals' *en banc* consideration, on its own motion, was not the first time that this case attracted unusual judicial attention. In 1991, concurring in a denial of certiorari after the completion of O'Dell's state habeas proceedings, Justice Blackmun, writing for himself, Justice Stevens and Justice O'Connor, stated that "the evidence raises serious questions about whether petitioner was guilty of the charged crime or was capable of representing himself." *O'Dell* v. *Thompson*, 502 U.S. 995, 995 (1991) (Statement of Blackmun, J., joined by Justices Stevens and O'Connor). The three Justices went on "to underscore the importance of affording petitioner meaningful federal habeas review" of, among other things, the claims presented in this Petition. *Id.* at 995-96 & n.3. (App. 177a-178a.)

The issue that divided the *en banc* court of appeals was whether this Court's decision in *Simmons* v. *South Carolina*, 114 S. Ct. 2187 (1994)—holding that when a prosecutor raises the issue of future dangerousness before a

capital sentencing jury, due process entitles the defendant to rebut by presenting information regarding his parole ineligibility—announced a "new rule" within the meaning of *Teague* v. *Lane*, 489 U.S. 288 (1989). 95 F.3d at 1220-38. (App. 8a-45a.) The seven-member majority held that *Simmons* announced a new rule, while the six dissenters disagreed.

The court of appeals manifested a profound division about how *Teague* should be applied: the majority found that *Simmons* was "the paradigmatic 'new rule,'" while the dissenters were equally "persuaded that *Simmons* did not announce a 'new rule.'" 95 F.3d at 1218, 1256. (App. 3a, 83a.) Further demonstrating that the majority's understanding of *Teague* was fundamentally different from that of their colleagues, the majority expressly overruled two recent Fourth Circuit panel decisions, *Turner* v. *Williams*, 35 F.3d 872 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1359 (1995), and *Ostrander* v. *Green*, 46 F.3d 347 (4th Cir. 1995), which, in the majority's view, would have permitted an "inestimable number of cases" to escape the *Teague* bar. 95 F.3d at 1222. (App. 11a.)

In addition, the majority held that the *Simmons* rule did not fall within the second exception to *Teague*, which allows for the retroactive application of procedural rules affecting the fundamental fairness and accuracy of criminal proceedings. 95 F.3d at 1239. (App. 45a-46a.) The dissenters did not reach this question, but stated that a "strong argument" could be made that the *Simmons* rule does fall within *Teague*'s second exception. 95 F.3d at 1261 n.11. (App. 95a.)[1/]

[1/] Both the majority and the dissenters expressly declined to reach whether the Antiterrorism and Effective Death Penalty Act of 1996, which (continued...)

The court of appeals also considered O'Dell's claim that DNA blood testing performed after his trial demonstrated that he is actually innocent of the crime, thereby permitting habeas review of other claims that would otherwise be procedurally barred. The district court determined that O'Dell's claim of innocence met the standard of *Kuhlmann* v. *Wilson*, 477 U.S. 436 (1986), *i.e.*, O'Dell had shown "a fair probability that, in light of all the evidence . . . the trier of the facts would have entertained a reasonable doubt of his guilt." *Id.* at 454 n.17. However, the district court deemed itself bound to apply the more stringent standard of *Sawyer* v. *Whitley*, 505 U.S. 333 (1992). While the case was on appeal, this Court issued its decision in *Schlup* v. *Delo*, 115 S. Ct. 851 (1995), which propounded a new test. The court of appeals applied the new *Schlup* standard to O'Dell's DNA evidence of innocence, and held that it was not met. 95 F.3d at 1246-55. (App. 62a-82a.)

Accordingly, the court of appeals entered judgment reversing the district court's order to the extent it invalidated O'Dell's death sentence and affirming it to the extent it denied habeas relief on O'Dell's conviction. 95 F.3d at 1255. (App. 82a-83a.)

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[1] (...continued)
was enacted while this case was pending on appeal, applies to this case. 95 F.3d at 1255 n.36, 1256 n.1. (App. 82a, 83a.) The circuit courts are currently split on this question. *Compare Lindh* v. *Murphy*, 96 F.3d 856, 867 (7th Cir. 1996) (*en banc*), *pet. for cert. pending*, No. 96-6298, and *Drinkard* v. *Johnson*, 97 F.3d 751, 766 (5th Cir. 1996) (holding statute applicable to cases pending on appeal), *with Huynh* v. *King*, 95 F.3d 1052, 1055 n.2 (11th Cir. 1996), *Boria* v. *Keane*, 90 F.3d 36, 38 (2d Cir. 1996), *pet. for cert. pending*, No. 96-628, and *Edens* v. *Hannigan*, 87 F.3d 1109, 1112 n.1 (10th Cir. 1996) (holding statute inapplicable to cases pending on appeal).

On October 8, 1996, the court of appeals granted a 30-day stay of the mandate to permit the filing of a petition for certiorari. (App. 171a.) Notwithstanding the stay, however, on October 24, 1996, the Virginia state court set an execution date for O'Dell. (App. 173a.) O'Dell is currently scheduled to be executed on December 18, 1996.[2]

B. Factual and Procedural Background[3]

O'Dell was convicted of capital murder in the death of Helen Schartner on February 6, 1985. There were no eyewitnesses to the crime. The case against O'Dell rested largely on the conclusion of a state laboratory technician, arrived at without the benefit of DNA testing (which was not then available), that blood on O'Dell's clothing was "consistent" with Schartner's blood. As explained more fully below, *see* pp. 23-29, *infra*, subsequent DNA evidence contradicted the blood evidence offered at trial. It is highly unlikely that any jury would have convicted O'Dell had it known what the DNA evidence shows.

The penalty phase of O'Dell's trial was indistinguishable from the penalty phase in *Simmons*. The substance of the prosecution's case for a death sentence was that mere imprisonment was ineffectual to curb O'Dell's criminal behavior and nothing short of death would keep O'Dell out of circulation. The prosecution highlighted O'Dell's past parole releases, and gave the false impression that O'Dell might be

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[2] On November 19, 1996, O'Dell applied to the court of appeals for a stay of execution. The court of appeals has not yet ruled on the application.

[3] Citations to "J.A. ___" refer to the Joint Appendix submitted to the court of appeals below.

similarly paroled if sentenced to life imprisonment for Schartner's murder.[4/]

In truth—as the jury never learned—under Virginia law, O'Dell would have been absolutely ineligible for parole had he been sentenced to life imprisonment. Va. Code Ann. § 53.1-151(B1). (App. 182a.) O'Dell requested that the court so instruct the jury. (J.A. 2308, 2378-79) This request was denied. (J.A. 2386.) O'Dell also sought to testify in direct examination as to his parole ineligibility. (J.A. 2431) This testimony was excluded. (*Id.*) It is beyond dispute—and neither the Commonwealth nor the majority below did dispute—that this ruling was contrary to this Court's holding in *Simmons* that a capital defendant has a due process right to rebut a claim of future dangerousness by presenting evidence of his parole ineligibility. Thus, if *Simmons* is applied to his case, O'Dell's death sentence cannot stand.

The jury fixed O'Dell's sentence at death, specifically finding that there was "a probability that the defendant would commit acts of violence that would constitute a continuing serious threat to society." Va. Code Ann. § 19.2-264.2(l). O'Dell's direct appeal to the Virginia Supreme Court was unsuccessful, 234 Va. 672, 364 S.E.2d 491, and his conviction became final on October 3, 1988—prior to this Court's

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[4/] The prosecution cross-examined O'Dell in exacting detail about his previous releases and pointed out that O'Dell served only seven months of a 1961 sentence, had served only 13 months of his next sentence, and was on parole at the time of Schartner's murder. (J.A. 2240-41) The Commonwealth again raised the specter of O'Dell's being paroled in its closing argument, in which it alluded to Florida's mistake in paroling O'Dell in 1982. (J.A. 2500) The Commonwealth also argued that "all the time he has committed crimes before and been before juries and judges, no sentence ever meted out to this man has stopped him and nothing ever will except the punishment that I now ask to impose." (J.A. 2502)

decision in *Simmons*, but subsequent to the two decisions on which *Simmons* primarily relied, *Gardner* v. *Florida*, 430 U.S. 349 (1977), and *Skipper* v. *South Carolina*, 476 U.S. 1 (1986).

Following an unsuccessful state court habeas proceeding (J.A. 278-79), O'Dell brought the federal habeas proceeding that is the subject of this Petition.

Argument

I.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER *SIMMONS* ANNOUNCED A NEW RULE FOR PURPOSES OF *TEAGUE*

A. The Question is a Substantial and Important One

The unusual importance of the first question presented in this case—whether the rule of *Simmons* is "new" for purposes of *Teague*—is evident from the proceedings in the court of appeals. On its own motion, the court of appeals selected this case for *en banc* consideration and rendered a 76-page slip opinion, with a 14-page dissent. The history of this case also shows that there is serious reason to doubt the correctness of the court of appeals' conclusion. The case was decided by the narrowest possible majority—7 to 6. The 14 judges—including the district judge—who have considered this issue in this case have divided equally on whether the rule of *Simmons* is "new." The Commonwealth can hardly argue that the question on which the court of appeals spent so much energy and divided so narrowly is not substantial or important.

Decisions of federal courts in other circuits reinforce the conclusion that the issue presented here calls for this Court's review. District courts in the Third and Seventh Circuits have considered the same issue, and have held that *Simmons* did not announce a "new rule." Their decisions are in direct conflict with the court of appeals' decision here. *Carpenter* v. *Vaughn*, 888 F. Supp. 658, 665-66 (M.D. Pa. 1995); *Spreitzer* v. *Peters*, 1996 WL 48585, at *5-*6 (N.D. Ill. Feb. 5, 1996). In addition, the Court of Appeals for the Seventh Circuit has indicated, in dictum, that it too would favor a result contrary to that of the Fourth Circuit here. *Stewart* v. *Lane*, 60 F.3d 296, 302 n.4 (7th Cir. 1995) (stating that, for purposes of *Teague*, "it is arguable that *Skipper* compels the result in *Simmons*"), *supplemented*, 70 F.3d 955, *cert. denied*, 116 S. Ct. 2580 (1996).

It is evident, we submit, that the question of whether *Simmons* announced a new rule deserves the attention of this Court. The proper time for giving that attention is now, to furnish a precedent for the numerous cases in which the issue is likely to recur.[3]

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[3] Counsel is aware of at least two pending cases in Virginia alone that raise the same issue presented here.

The Court's recent grant of certiorari in *Lambrix* v. *Singletary*, No. 96-5658, confirms that this case is worthy of the Court's review. *Lambrix*, like this case, raises the issue of whether a recent decision of this Court announced a "new rule" under *Teague*. The issue in *Lambrix*, as in this case, divided an *en banc* court of appeals. *Lambrix* v. *Singletary*, 72 F.3d 100 (11th Cir. 1996) (relying on *Glock* v. *Singletary*, 65 F.3d 878 (11th Cir. 1995) (*en banc*)). *Lambrix* concerns the retroactivity of this Court's holding in *Espinosa* v. *Florida*, 505 U.S. 1079 (1992), regarding the role of one of the aggravating factors in Florida's "trifurcated" sentencing scheme; in *Glock*, the Eleventh Circuit held, 7-3, that *Espinosa* announced a "new rule." This Court's decision in *Simmons* is at least as significant (continued...)

B. The Court of Appeals' Decision Takes an Extreme Approach to *Teague* That Is in Conflict With Decisions of This Court

The majority's holding in this case, we respectfully submit, marks a radical departure from the approach to *Teague* questions established by prior decisions of this Court. The extreme nature of the majority's approach is reflected in its overruling of prior circuit precedents; its stated belief that a reasonable jurist would have thought it "all but a certainty that the rule of *Simmons* was not only *not* compelled, but *forbidden*;" and its remarkable conclusion that *Simmons* constitutes "the *paradigmatic* 'new rule.'" 95 F.3d at 1222, 1231-32, 1218 (emphasis added). (App. 12a, 31a, 3a.)

It would be more accurate to say that *Simmons* furnishes a "paradigmatic" example of what is *not* a new rule.

A decision constitutes a "new rule" within the meaning of *Teague* if it "breaks new ground or imposes a new obligation on the States." *Teague* v. *Lane*, 489 U.S. 288, 301 (1989). By contrast, a rule is deemed not "new" if a reasonable jurist in considering the petitioner's claim at the time the conviction became final would have felt "*compelled* by existing precedent to conclude that the rule [petitioner] seeks was required by the Constitution." *Saffle* v. *Parks*, 494 U.S. 484, 488 (1990) (emphasis added).

Here, four reasonable jurists who were Members of this Court—the authors of the plurality opinion in *Simmons*—

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[3] (...continued)
as *Espinosa*, and the Fourth Circuit below was even more narrowly divided than the Eleventh Circuit was in the decision at issue in *Lambrix*.

expressly stated that the *Simmons* decision was "compel[led]" by existing precedent. *Simmons*, 114 S. Ct. at 2194. Three concurring Justices, while not actually using the verb "compel," indicated in substance their agreement with the plurality. *Id.* at 2200-01. Thus, if this Court meant what it said in *Saffle* v. *Parks*, *Simmons* presents a straightforward example of a decision that did *not* announce a "new rule."

The decisions that the *Simmons* Court found "compel[led]" its result were *Gardner* v. *Florida*, 430 U.S. 349 (1977), and *Skipper* v. *South Carolina*, 476 U.S. 1 (1986). *Gardner* concerned a defendant who was sentenced to death based in part on a pre-sentence report that was not made available to him, and therefore could not be rebutted. This Court ruled that the Due Process Clause does not permit the execution of a person "on the basis of information which he had no opportunity to deny or explain." *Gardner*, 430 U.S. at 362. *Skipper* applied this principle to a specific situation strikingly similar to the situation presented here and in *Simmons*. In *Skipper*, this Court held that a defendant was denied due process by the refusal of a trial court to admit evidence of the defendant's good behavior in prison during the penalty phase of his capital trial. The Court explained that "[w]here the prosecution relies on a prediction of future dangerousness in asking for the death penalty," fundamental due process principles require the admission of the defendant's relevant evidence in rebuttal. *Skipper*, 476 U.S. at 5 n.1.

In essence, *Simmons* presented a variation on the facts in *Skipper*. Skipper was denied the right to prove that he had behaved well in prison, and thereby suggest to the jury that he would not be dangerous if sentenced to life imprisonment. Simmons sought to present to the jury the even more obviously relevant fact that he would *be* in prison, and not out on the street, for the rest of his life if given a life sentence.

It is small wonder that the *Simmons* Court found that *Gardner* and *Skipper* "compel[led]" the upholding of Simmons' claim under the Due Process Clause. As the dissenters below noted:

> The similarity between the situation that confronted Skipper and Simmons is especially striking. Surely a Constitution that entitles a defendant to rebut the prosecution's argument of future dangerousness with evidence of his good behavior in prison likewise entitles him to inform the jury that he will remain incarcerated for life. *Cf.* [*Skipper*, 476 U.S.] at 5 n.1. Thus, it would have been an illogical application of *Skipper* "to [have] decide[d] that it did not extend to the facts of" *Simmons*.

95 F.3d at 1258 (quoting *Butler* v. *McKellar*, 494 U.S. 407, 415 (1990)). (App. 88a.) Even the majority below conceded that:

> Were *Gardner* and *Skipper* the totality of the "legal landscape" in 1988, the claim that *Simmons* was not a new rule might, at least at first blush, have considerable force.

95 F.3d at 1225. (App. 17a.)

Where the majority below departed radically from established *Teague* jurisprudence was in its strenuous attempt to construct a theory on which a "reasonable jurist" *might* have found that the result in *Simmons* was not compelled by *Gardner* and *Skipper*. For this conclusion, the majority relied principally on *California* v. *Ramos*, 463 U.S. 992 (1983), in which this Court upheld as consistent with due process a California sentencing provision that permitted the trial court to advise the jury of the Governor's power to commute a life

sentence, but did not require it to inform the jury of the Governor's power to commute a death sentence.

On its face, *Ramos* is obviously distinguishable from *Simmons*: the possibility that the Governor will commute a sentence of death is simply not comparable, in its potential impact on a sentencing jury, to a statutory guarantee that the defendant will never be paroled. It is easy to imagine a jury that will vote for a death sentence because it thinks parole is a possibility; it is rather difficult to imagine a jury that will vote for a death sentence only because it is unaware of the Governor's commutation power. Because the information withheld from the jury in *Ramos* was so much less relevant than the information withheld in *Simmons*, *Ramos* furnishes no basis for upholding the practice that *Simmons* rejected.[9]

Moreover, the *Ramos* decision expressly recognized that a state's general discretion to determine what a jury may be told about sentencing is *limited* by *Gardner*'s due process right of rebuttal. *Ramos*, 463 U.S. at 1004. Indeed, *Ramos*—which was decided prior to *Skipper*—carefully noted that "the California statute in question *permits* the defendant to present any evidence to show that a penalty less than death is appropriate in his case." *Id.* at 1005 n.19 (emphasis added).

Nevertheless, the majority below devoted six pages of its opinion to an intense—we think it fair to say, a tortured—analysis of *Ramos* and *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985) (holding that, under the Eighth Amendment, it was

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[9] In fact, in the last two years, only two death sentences have been imposed in Virginia for crimes committed after January 1, 1995--down from ten death sentences in 1994 alone--a decline that experts attribute directly to the fact that juries must now be informed of Virginia's life-without-parole rule. *See* Frank Green, *Death Sentences Decline in Virginia*, Richmond Times-Dispatch, Nov. 24, 1996. (App. II 279a.)

impermissible for a prosecutor to tell the jury that it would not be finally responsible for the death penalty because its decision was subject to appellate review). 95 F.3d at 1225-31. (App. 17a-31a.) The majority concluded that a reasonable jurist "would have been obliged to reconcile" what it perceived as a tension between *Gardner* and *Skipper*, on the one hand, and *Ramos* and *Caldwell*, on the other hand. 95 F.3d at 1232. (App. 31a.) According to the majority, a reasonable jurist would have found this "reconciliation" in a "fact/law" distinction:

> That is, a reasonable jurist could have concluded that the due process principle of *Gardner* and *Skipper* was that a trial court could not deny a capital defendant the opportunity to rebut arguments made by the State with relevant factual evidence about himself, his character, and his particular offense. . . .
>
> In contrast, that 1988 jurist could have and, indeed, would have most reasonably understood *Ramos* . . . as setting forth the principle that whether to instruct juries on state law . . . is a decision left to the "wisdom of the states" by the Constitution. . . .

95 F.3d at 1232-33. (App. 32a-34a.)

So far as we are aware, the members of the majority are the first "reasonable jurists" anywhere to perceive this supposed tension between *Gardner* and *Skipper*, on the one hand, and *Ramos* and *Caldwell*, on the other hand—let alone attempt to "reconcile" them on the basis of a "fact/law" distinction. The majority cited a number of cases decided prior to *Simmons* that cited *Ramos* for the proposition that a defendant was not entitled to present information about parole eligibility to a jury, but these cases turned on different facts and contained little, if any, analysis—and no analysis remotely

resembling that of the majority. *See, e.g., Peterson* v. *Murray*, 904 F.2d 882, 886-87 (4th Cir.), *cert. denied*, 498 U.S. 992 (1990); *Knox* v. *Collins*, 928 F.2d 657, 660 (5th Cir. 1991) (both cited at 95 F.3d at 1237. (App. 42a.)).

Indeed, there is no pre-*Simmons* decision that attempts a reasoned justification of the practice that *Simmons* condemned—the practice of forcing a jury to decide the issue of future dangerousness in ignorance of the fact that the defendant is facing life without parole. The unfairness of such a procedure is obvious. There never was a time when any "reasonable jurist" would have thought it fair to condemn a man to death in such a manner.

Thus, it is small wonder that the "fact/law" distinction on which the majority below relied finds no support in precedent. Nor was it ever suggested by the Commonwealth below. It is a completely artificial and, as applied to this case, meaningless distinction. What O'Dell wanted the jury to know here was essential factual information—that, in truth, if given a life sentence, he would spend the rest of his life in prison. The relationship of this fact to the Virginia parole statute does not justify concealing it from the jury. The reason suggested by the majority below—that the state of the law can "change with time," while facts cannot, 95 F.3d at 1234 (App. 35a)—is wholly unconvincing. Good behavior, for example—the "fact" at issue in *Skipper*—is at least as likely as the life-without-parole statute at issue here and in *Simmons* to "change with time." The "fact/law" distinction makes no sense in the context of this issue.

In sum, the majority in the court of appeals went to enormous lengths to avoid the obvious conclusion—that *Simmons* was a "compel[led]" consequence of *Gardner* and *Skipper*—and to construct an artificial theory on which *Simmons* might have been thought to be a "new rule." This

approach—which invites courts to elevate practically any decision of significance to the status of a "new rule"—is wholly inconsistent with this Court's well-established *Teague* jurisprudence. *See, e.g., Stringer* v. *Black*, 503 U.S. 222, 237 (1992) ("The purpose of the new rule doctrine is to validate reasonable interpretations of existing precedents" based on an "objective" standard.); *Wright* v. *West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring in the judgment) ("If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful and any deviation from precedent is not reasonable.").[7]

II.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER *SIMMONS* FALLS WITHIN THE SECOND EXCEPTION TO *TEAGUE*

Even if a decision announces a "new rule," it should nevertheless be applied retroactively if it falls within the second exception to *Teague*, that is, if it constitutes one of the "bedrock" procedural protections without which "the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 311-13. Even on the assumption that *Simmons* announced a new rule, a substantial issue is pre-

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[7] Indeed, it is instructive to compare the majority's opinion below to the *dissents* from decisions of this Court holding that particular rules were not "new" under *Teague*. *See Stringer*, 503 U.S. at 238 (Souter, J., dissenting); *Penry* v. *Lynaugh*, 492 U.S. 302, 350 (1989) (Scalia, J., dissenting in part). In both cases, we respectfully submit, the dissenters had a far better basis for arguing that the rules in question were "new" than did the majority below. Yet, in both *Stringer* and *Penry*, a majority of this Court held that no "new rule" had been announced.

sented as to whether this "bedrock" exception to *Teague* applies.

The six dissenters below did not need to reach this question in light of their conclusion that the applicable rule in *Simmons* was not a "new rule." 95 F.3d at 1261 n.11. (App. 95a.) Nevertheless, the dissenters observed that:

> a strong argument could be made that when a state undertakes to impose a death sentence solely on the ground that a capital defendant poses a further danger, "fundamental fairness and the accuracy of the criminal proceeding" demand that he not be precluded from showing that he was, by virtue of the law of that state, parole ineligible.

Id. (quoting *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990)).

The majority cursorily dismissed this argument, stating only that "[w]e do not believe that the rule announced in *Simmons* is on par with the rule announced in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963)." 95 F.3d at 1239. (App. 46a.)

The majority was wrong in taking the issue so lightly. As the *Simmons* concurrence observed, it is a "hallmark[] of due process" that a defendant be entitled to "meet the State's case against him." *Simmons*, 114 S. Ct. at 2200 (O'Connor, J., concurring). *Simmons* was based on this Court's view that, where a prosecutor has raised the issue of future dangerousness, if the defendant is not permitted to rebut by presenting accurate information about his parole ineligibility, it is significantly less likely that the sentencing jury will decide the dangerousness issue accurately. In other words, *Simmons* is a decision that protects a capital defendant against

a misinformed and mistaken decision that could cost him his life.

Seen in this light, the applicable rule of *Simmons is* "on par" with *Gideon* in the relevant way: both decisions rest upon this Court's belief that certain procedural protections are essential to prevent miscarriages of justice. *Compare*, *e.g.*, *Williams* v. *Dixon*, 961 F.2d 448, 454-56 (4th Cir.) (rule forbidding unanimity requirement for jury's finding of mitigating circumstances falls within the second *Teague* exception), *cert. denied*, 506 U.S. 991 (1992); *Nutter* v. *White*, 39 F.3d 1154, 1157-58 (11th Cir. 1994) (rule invalidating faulty reasonable-doubt instruction falls within exception).

As five judges of the Eleventh Circuit explained in concluding that the rule of *Gardner* falls within the second exception to *Teague*:

> *Teague* provides for retroactive application of "accuracy-enhancing procedural rules" which implicate the "bedrock procedural elements" of a criminal conviction. . . . The principle enunciated in *Gardner* is clearly such a rule. This rule is meant to provide for better fact-finding through adversarial procedure. *Gardner* allows crucial information to be clarified and supplemented. The result is that the sentencer has an improved and more accurate view of the facts upon which the sentence should be based.

Moore v. *Zant*, 885 F.2d 1497, 1525 (11th Cir. 1989) (Johnson, J., dissenting), *cert. denied*, 497 U.S. 1010 (1990); *see also id.* at 1521 (Kravitch, J., dissenting) (*Gardner* is "based on the right of confrontation, and our adversarial system—unlike the inquisitorial method—depends above all

else upon the right of confrontation to arrive at an accurate result.").[1]

The question of whether the holding of *Simmons* falls within the second exception to *Teague* is an issue worthy of consideration by this Court.

III.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER THE DNA EVIDENCE IS A SUFFICIENT SHOWING OF ACTUAL INNOCENCE UNDER *SCHLUP*

To provide a basis for understanding the *Schlup* "actual innocence" issue here, it is necessary to review the evidence in some detail. It is also necessary to point out that the court of appeals' description of the evidence is riddled with factual errors and misleading characterizations. Some of these are corrected below, and others are listed in Volume II of the Appendix.

A. Apart From the Blood Evidence, the Evidence Against O'Dell Was Insubstantial

1. The Events of February 5-7, 1985

Helen Schartner's body was found in a field behind the After-Midnight Club in Virginia Beach, Virginia on February 6, 1985. (J.A. 17, 2252) Schartner had been at the County Line, a Western-style bar and dance hall, with a

[1] In *Moore*, there was no majority opinion of the *en banc* court; the plurality disposed of the case on different grounds and did not address whether the rule of *Gardner* falls within the second exception to *Teague*.

number of friends the prior evening. She was seen leaving the County Line between 11:15 and 11:25 p.m. (J.A. 1194, 1221) O'Dell was also at the County Line on February 5. However, there is no indication that O'Dell knew Schartner, danced with her that night, spoke with her or left with her. Undisputed testimony at trial showed that O'Dell left the County Line alone at midnight, considerably later than Schartner. (J.A. 2003-04) O'Dell's clothes became bloody that night, but no witness connected the blood to the Schartner murder. O'Dell's explanation—that he was in a fight at a place called the Brass Rail on the night of the murder—was corroborated by independent evidence. Two employees at the bar testified that the fight had taken place, and one identified O'Dell as the man who had intervened and been bloodied in the effort. (App. II 252a-257a.) Two Norfolk police officers responded to a call reporting a fight at the same time and location. (App. II 259a-261a.)

There were no eyewitnesses to the crime. No evidence linked O'Dell to it except forensic evidence and a purported confession O'Dell supposedly made to a fellow prisoner, Steven Watson.

2. The Forensic Evidence

Jacqueline Emrich, a neophyte forensic technician (J.A. 1701), analyzed the blood on the soiled clothing found at the home of O'Dell's lover, and blood on certain items retrieved from O'Dell's car. DNA testing did not then exist, and the dried blood was compared to O'Dell's and Schartner's blood using the controversial method known as multisystem electrophoresis. (J.A. 326, 1849-54) Emrich ignored standard scientific methods in failing to replicate the test. (J.A. 2124-33) She also failed to record numerous important variables, such as the nature of the solutions and gels she used and the voltage at which the test was performed. (J.A. 2099-2100)

Nor was any blind testing performed by another technician to verify the accuracy of Emrich's results. (J.A. 1929-30, 2095) Despite these errors in methodology, and the incomplete, inconsistent and inconclusive results that were obtained, Emrich was permitted to opine at trial that the bloodstains found on O'Dell's clothes and in his car were "consistent" with the blood of the victim. (J.A. 1927)

Aside from this blood evidence, the other forensic evidence failed to link O'Dell to the murder; indeed, some of the forensic evidence was strongly exculpatory. Thus, although the Commonwealth maintained that Schartner had been raped, and the rape was essential to make the killing a capital murder, seminal fluid found in her vagina and anus did not match the enzymes found in O'Dell's seminal fluid. (J.A. 1888-90) A vaginal swab enzyme test showed that sperm found in the victim's vagina and anal cavity had a PGM 2-1 marker (J.A. 1889, 1891), while O'Dell's marker is PGM-1. (J.A. 1888) No satisfactory explanation was given for this discrepancy. Emrich speculated that vaginal fluid—containing PGM 2-1—when commingled with the sperm, changed the sperm's marker to PGM 2-1 (J.A. 1937), but that does not explain how a PGM 2-1 marker was found in the anal cavity, since there it is no vaginal fluid in that portion of the body.[9]

Other forensic evidence simply proved nothing.

No fingerprints of O'Dell were found in the victim's car (J.A. 1568-69), and no fingerprints of the victim were found in O'Dell's car. None of O'Dell's fingerprints were

[9] Contrary to the court of appeals' decision, 95 F.3d at 1251 (App. 74a), the Commonwealth's trial expert testified that the source of the sperm could have had any of three different types of PGM markings. (J.A. 1960)

found at the scene where the body was discovered (J.A. 1238-49), and the Commonwealth's forensic expert was unable to testify that tire tracks found at the scene were from O'Dell's car. (J.A. 1266, 2294) A Marlboro softpack cigarette was found near the body, but it was undisputed that O'Dell smoked Winstons. (J.A. 1523-26, 2294-95) Moreover, O'Dell's boots did not match footprints found at the scene. (J.A. 1015-20) Indeed, the trial judge remarked that, "It's obvious from everybody's information and the evidence before the Court that the footprint that was found was not your footprint. Whose it was, who knows." (J.A. 2294)

The crime scene was wet and muddy, but no mud, botanical debris or other matter from the murder scene was found in O'Dell's car, even though the Commonwealth claimed that he wrestled on the ground with the victim during the murder. (J.A. 1385-86) Nor was there any evidence that the soil on O'Dell's clothing or shoes matched soil in the field, even though the prosecution told the jury that O'Dell had held the victim's head down with his knees. (J.A. 2253)

Furthermore, Emrich's test revealed no blood, semen, hairs or other biological indicia of O'Dell on the victim's clothes. (J.A. 1932) Contrary to the court of appeals' decision below, 95 F.3d at 1219, 1251 (App. 5a), the large majority of hairs found in O'Dell's car were neither O'Dell's nor Schartner's, and the three hairs purportedly found to be "consistent" with Schartner's could have belonged to "a lot of women" other than Schartner. (J.A. 1912-17, 1925)

3. Steven Watson

Steven Watson testified that, while he and O'Dell were incarcerated in the medical block at the Virginia Beach City Jail, O'Dell confessed to him that he committed the Schartner murder. (J.A. 1672-75) (By contrast, Connie Craig, a

prosecution witness who was O'Dell's lover at the time of the crime, did not claim that he ever admitted guilt to her.) Watson's criminal record (J.A. 1670-71), and his penchant for making deals with the authorities (J.A. 80, 1681, 1696, 1753-56), combined with the blatantly false nature of the story, rendered his testimony worthless. (Indeed, after the court of appeals' decision below, Watson recanted and executed a detailed and persuasive affidavit admitting that he had lied in his trial testimony. *See* n.14, *infra.*)

Watson's version of the murder contradicted the prosecution's theory. Watson testified that O'Dell purchased Schartner drinks and they left together (J.A. 1674), whereas every other witness who was present at the County Line on the night in question testified that O'Dell and Schartner were not together in the bar. (*See, e.g.*, J.A. 2004) In fact, the eyewitness testimony was that O'Dell left by himself, substantially later than Schartner. (*See, e.g.*, J.A. 2003) Whereas the prosecution's witnesses testified that Schartner had been repeatedly bludgeoned with a blunt object (J.A. 1401-05, 2906), Watson made no mention of these blows. He testified that O'Dell "put his hand around her throat and strangled her." (J.A. 1674)

Watson faced life imprisonment on several felony charges. From jail, he called and wrote to the Commonwealth's attorney "informing" him of O'Dell's "confession" and asking for "help." (J.A. 240-41, 1684-87) Felony charges against Watson and his wife were later dropped, and he received probation instead of a life sentence. (J.A. 240-41, 1689) Watson himself admitted after trial that he engaged in bargaining with authorities prior to the dropping of his West Virginia charges. (J.A. 240-41) Additionally, John Wayne Reid, a West Virginia State Trooper, testified that Watson "has a reputation of being untruthful" (J.A. 2044), and that Watson told him about a "deal" in the O'Dell case.

(J.A. 2050) Steven Jory, Watson's attorney at the time, recounted that one of the conditions of Watson's plea was that Watson, a West Virginia resident, return to Virginia Beach, Virginia—the site of O'Dell's trial—to serve his probation. (J.A. 242) This condition was requested by the local prosecutor's office. (*Id.*) Following O'Dell's trial, Watson was permitted to return to West Virginia. (J.A. 78)

At trial, O'Dell attempted, but was not allowed, to demonstrate through the testimony of Larry Talkington, a co-defendant of Watson in a West Virginia matter, that Watson was a frequent informant who would go to great lengths to avoid jail. (J.A. 2038, 2056-57) Additionally, O'Dell attempted to proffer three letters that Watson had written to judges in Virginia Beach concerning deal-making. (J.A. 1753-56) In one letter, Watson wrote: "Let's make a deal Judge Whitehurst. I want out of jail any kind of way I can get out. Let's make a deal." (J.A. 1753) The proffer of this evidence was denied and the jury never heard it. (J.A. 1761-64)

B. Subsequently-Obtained DNA Evidence Contradicted the Blood Evidence Used at Trial

1. State Habeas Proceedings

O'Dell brought habeas corpus proceedings in the Virginia state courts. Most of his claims were dismissed without an evidentiary hearing, but a limited hearing was permitted on two issues, one of which was the reliability of Emrich's forensic analysis. (J.A. 207) At that hearing, O'Dell presented the results of a DNA analysis prepared by LifeCodes, Inc. on the same areas of clothing tested by the Commonwealth's trial expert. (J.A. 2570-633, 2717-58) With respect to the DNA evidence, O'Dell's and the Commonwealth's expert witnesses agreed: all of them

concluded that the DNA evidence showed an *exclusion* between the blood on O'Dell's shirt and the victim's blood (J.A. 2600-2601, 2633, 2750), and that the DNA testing comparing the blood on O'Dell's jacket to the victim's blood produced an inconclusive result. (J.A. 2602, 2750)[10/]

Following the hearing, the court dismissed the state habeas petition. (J.A. 2776-80) On the DNA issue, the court found that O'Dell had received a fair trial under the state of scientific knowledge in 1985, but acknowledged that "current testing methods would have produced a different result." (J.A. 2779) Virginia courts do not recognize actual innocence either as a basis for relief or as a gateway to reaching defaulted claims.

On petition for certiorari from the denial of state habeas relief, three Members of this Court expressed the view that, in light of DNA blood testing performed after O'Dell's trial, "there are serious questions as to whether O'Dell committed the crime." *O'Dell* v. *Thompson*, 502 U.S. 995, 998 (1991) (Statement of Blackmun, J., joined by Justices Stevens and O'Connor). (App. 180a.)

2. Federal Habeas Proceedings

After exhausting state remedies, O'Dell began the present federal habeas corpus proceeding. The district court ordered an evidentiary hearing to determine whether O'Dell could show actual innocence such that his otherwise procedurally barred claims could be considered on the merits

[10/] The majority opinion below gives the misleading impression that the Commonwealth's experts endorsed LifeCodes' conclusion that the blood on O'Dell's jacket was Helen Schartner's. 95 F.3d at 1253. (App. 77a.) In fact, no expert who testified for either side gave this opinion.

under *Sawyer* v. *Whitley*, 505 U.S. 333 (1992), or his execution would be unconstitutional under *Herrera* v. *Collins*, 506 U.S. 390 (1993). (J.A. 243, 298) However, the district court limited the one-day hearing only to testimony from experts on DNA. (App. II 251a)[11/]

After hearing experts from both sides, the district court made factual findings that the blood on the shirt was *not* Helen Schartner's and that her blood could not be matched with the blood on the jacket. (App. 68a.) The district court further held that the newly discovered DNA evidence demonstrated O'Dell's factual innocence under the "fair probability standard" set forth in *Kuhlmann* v. *Wilson*, 477 U.S. 436 (1986). Nevertheless, the district court held that O'Dell had failed to satisfy the more demanding "clear and convincing" standard required by *Sawyer*. (App. 129a.)

While the case was on appeal, this Court issued its decision in *Schlup* v. *Delo*, 115 S. Ct. 851 (1995), which held that a habeas petitioner claiming "actual innocence" as a ground justifying review of what would otherwise be procedurally barred claims need only show that it is "more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 867. Here, the court of appeals held that the DNA evidence undermining the prior, less accurate blood tests on which O'Dell was convicted did not meet the *Schlup* standard. The court of appeals also refused to order a full evidentiary hearing on the innocence issue.

[11/] Contrary to the court of appeals' opinion, the district court, despite O'Dell's request, did not conduct a "full evidentiary hearing" on actual innocence. 95 F.3d at 1250. (App. 71a.)

C. The DNA Evidence Satisfies *Schlup*

The court of appeals' narrow and grudging application of *Schlup* is a departure from precedent that warrants this Court's review. Indeed, three Members of this Court previously expressed the view that, in light of the DNA blood testing performed after O'Dell's trial, "there are serious questions as to whether O'Dell committed the crime." *O'Dell* v. *Thompson*, 502 U.S. 995, 998 (1991) (Statement of Blackmun, J., joined by Justices Stevens and O'Connor).

After holding a one-day evidentiary hearing restricted to DNA evidence, without giving O'Dell a chance to present other evidence relevant to his innocence, the district court specifically found that O'Dell met the *Kuhlmann* standard, which requires a petitioner to show "a fair probability that, in light of all the evidence . . . the trier of the facts would have entertained a reasonable doubt of his guilt." *Kuhlmann*, 477 U.S. at 454 n.17. While this case was on appeal, however, this Court issued its decision in *Schlup*, in which it adopted the standard of *Murray* v. *Carrier*, 477 U.S. 478 (1986), for claims of "actual innocence," requiring that the petitioner show that it is "more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 115 S. Ct. at 867. As the court of appeals below acknowledged, this standard is "similar" to and "has been treated as functionally the same" as the *Kuhlmann* standard that the district court found O'Dell met. 95 F.3d at 1249 (quoting *Schlup*, 115 S. Ct. at 863-65). (App. 69a.)

However, rather than remanding the case to allow the district court to consider O'Dell's actual innocence claim in light of the new standard, the court of appeals proceeded to apply it itself. 95 F.3d at 1250-54. (App. 72a-79a.) In doing so, the court of appeals took great liberties with the facts, selectively substituting its conclusions for those of the district

court, while rejecting or ignoring contrary findings by the district court that were amply supported by the record.

O'Dell's conviction stands or falls on the original forensic blood evidence. There is no other evidence of real weight. O'Dell demonstrated below that, in light of more accurate DNA testing that shows no connection between O'Dell and the crime, the blood evidence introduced at trial misled the jury.

As the district court expressly found, DNA testing shows that the only meaningful blood evidence is *exculpatory*: the blood on the shirt "could not have come from Schartner" (App. 102a), and no determination about the blood on the jacket can be made. (App. 68a, 128a.)

The court of appeals dismissed these findings as "not particularly helpful." 95 F.3d at 1248. (App. 68a.)[12] It conceded that "the LifeCodes report, the Commonwealth's experts, and O'Dell's expert all agree[d] that one of the stains on his shirt was from neither O'Dell nor Schartner." 95 F.3d at 1253. (App. 77a.) However, it maintained that "*the LifeCodes DNA report conclusively stat[ed] that the blood on O'Dell's jacket was Helen Schartner's*," and that a reasonable juror might find this a sufficient basis to convict. *Id.* (italics in original). In doing so, however, the court of appeals improperly disregarded the district court's express finding that O'Dell's expert was more persuasive on the inferences that could properly be drawn from the data upon which LifeCodes relied—an expert that the court of appeals itself acknowledged

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[12] Despite this observation, in declining to remand for the district court to apply the new standard, the court of appeals inconsistently declared that the district court had "made adequate factual findings." 95 F.3d at 1250. (App. 71a.)

was "at least credible." *Id.*[13] In short, the court of appeals impermissibly construed the DNA evidence in a way that the district court expressly *found* to be unpersuasive, thereby usurping the exclusive province of the factfinder.

The rest of the evidence upon which the court of appeals relied could not possibly persuade a reasonable juror of O'Dell's guilt. The forensic evidence, apart from the blood evidence, is described above; to the extent it proves anything, it is exculpatory.

Absent the blood evidence, the Commonwealth's case depended wholly on the testimony of Steven Watson, the "jailhouse snitch" whose testimony is summarized above. It is plain, we submit, that no reasonable jury could convict O'Dell based on Watson's testimony, and the court of appeals erred in relying on it.[14]

Although O'Dell's habeas petition requested an evidentiary hearing on all of his claims (J.A. 175), the district court limited O'Dell's hearing to but a single issue—the DNA

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[13] LifeCodes declared a match only after using a monomorphic probe to "correct" for band shifting. LifeCodes' controversial method of "correcting" test results that otherwise do not match has been rejected by other laboratories, the scientific community, *see* National Research Council, *DNA Technology in Forensic Science* 61 (1992), and the courts, *see People* v. *Keene*, 591 N.Y.S.2d 733, 740 (N.Y. Sup. Ct. 1992); *State* v. *Quatrevingt*, 670 So. 2d 197, 205-06 (La.), *cert. denied*, 117 S. Ct. 294 (1996).

[14] Indeed, after the court of appeals below issued its decision, Watson formally *recanted* his testimony at O'Dell's trial, stating that he had made up O'Dell's "confession" to obtain release from the West Virginia charges and in response to improper prosecutorial pressure. *See* Joe Jackson, *Witness Recants Testimony that Death-Row Inmate Confessed in Jail*, The Virginian-Pilot, Oct. 23, 1996. (App. II 246a.)

evidence. (J.A. 243) Although the DNA evidence by itself is sufficient to permit review of procedurally barred claims, the court of appeals erred in not remanding for a full hearing on the "circumstantial evidence" and Watson's testimony. Had O'Dell been given such a hearing, he could have still more clearly demonstrated his actual innocence.

The district court's limitation of the evidentiary hearing to DNA evidence prevented O'Dell from presenting, for example, expert evidence as to the significance of the enzyme markers in the seminal fluid found in the victim's body -- evidence demonstrating that O'Dell could not have raped Schartner. O'Dell was also prevented from presenting witnesses who could have contradicted Watson's patently incredible—and subsequently recanted—denials that he arranged a plea agreement in exchange for his testimony. (J.A. 1675, 1689) O'Dell is entitled to an unfettered hearing on his claim of actual innocence. *See Keeney* v. *Tamayo-Reyes*, 504 U.S. 1, 11-12 (1992) (requiring that an evidentiary hearing be held if a fundamental miscarriage of justice would otherwise occur).

O'Dell was wrongly convicted of committing this crime. The court of appeals departed from precedent in holding that the DNA evidence did not establish O'Dell's actual innocence under *Schlup* and did not justify a remand for a full evidentiary hearing on actual innocence. Certiorari should be granted to correct this important error.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Dated: November 26, 1996

Respectfully submitted,

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No. 96-6867

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

JOSEPH ROGER O'DELL, III

Petitioner

v.

J. D. NETHERLAND, WARDEN, et al.

Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court review the Fourth Circuit's conclusion that the rule in Simmons v. South Carolina may not be applied retroactively to O'Dell's collateral case even though all the circuit courts and state supreme courts that have addressed the issue agree with the Fourth Circuit that the law at the time O'Dell's case became final did not "compel" the rule in Simmons?

2. Should certiorari be granted to review the court of appeals' routine, fact-specific conclusion that the firmly established "actual innocence" standard has not been satisfied in O'Dell's case?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

In his previous petition for a writ of certiorari, filed after his state habeas corpus review, O'Dell deliberately withheld crucial evidence demonstrating his guilt of capital murder: his own experts had matched DNA found on his jacket to DNA from his murder victim. O'Dell thus grossly misrepresented the facts of his case in that petition and three members of this Court expressed their opinion that there were serious questions about O'Dell's guilt. See O'Dell v. Thompson, 502 U.S. 995, 999 (1991) (Blackmun, J., joined by Stevens and O'Connor, J.J.). Once the truth was revealed in the subsequent federal habeas proceedings, however, all thirteen judges of the Fourth Circuit Court of Appeals agreed that O'Dell had not shown "actual innocence."

A majority of the Fourth Circuit also rejected O'Dell's claim that this Court's decision in Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187 (1994), should be applied retroactively to his 1988 case. The court carefully analyzed the law from this Court existing in 1988 and properly concluded that a reasonable jurist could have decided that it was permissible for a State to prohibit jury instruction on its parole law.

STATEMENT OF THE CASE

Joseph O'Dell brutally murdered Helen Schartner during the commission of a rape in Virginia Beach, Virginia. At the time of the murder, O'Dell was on parole from sentences received in Florida for the kidnapping and robbery of a woman he had viciously attacked under circumstances similar to the later Virginia murder. He was tried by a jury in the Circuit Court of the City of Virginia Beach, convicted of capital murder and sentenced to death on November 13, 1986.

On January 15, 1988, the Supreme Court of Virginia affirmed O'Dell's convictions and sentence of death. O'Dell v. Commonwealth, 234 Va. 672, 364 S.E.2d 491 (1988). This Court then denied O'Dell's first certiorari petition. O'Dell v. Virginia, 488 U.S. 871 (1988).

O'Dell filed a habeas corpus petition in the Circuit Court of the City of Virginia Beach in June of 1989. On October 23, 1990, an evidentiary hearing was held and on November 26, 1990, the Circuit Court entered a final order denying the petition. O'Dell filed a notice of appeal to the Virginia Supreme Court, but by order of April 1, 1991, that Court dismissed the appeal because O'Dell did not file a timely petition for appeal. On December 2, 1991, this Court denied O'Dell's second certiorari petition. O'Dell v. Thompson, 502 U.S. 995 (1991).

O'Dell filed a habeas petition in the United States District Court for the Eastern District of Virginia on July 14, 1992. Over two years later, on August 2, 1994, an evidentiary hearing was conducted. On September 6, 1994, the district court, after dismissing most of O'Dell's claims, vacated his death sentence on the basis of a recent decision from this Court and ruled that the trial court improperly had refused to allow O'Dell to inform the jury that he would be parole ineligible if sentenced to life imprisonment.

The Warden appealed to the United States Court of Appeals for the Fourth Circuit and, on September 10, 1996, the Fourth Circuit, sitting en banc[1], reversed the district court's grant of habeas relief. O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996). The Court of Appeals held that O'Dell's claim concerning his parole ineligibility did not warrant relief because the application of Simmons v. South Carolina to his case would constitute an impermissible "new

[1] The case was heard en banc on the Fourth Circuit's own motion, without first having been heard by a panel.

rule." O'Dell, 95 F.3d at 1238-1239. On O'Dell's cross-appeal, the Fourth Circuit ruled that the district court correctly had determined that O'Dell had not established "actual innocence" so as to overcome his defaulted claims. Indeed, ***all thirteen Fourth Circuit judges*** agreed that O'Dell had not "come even close" to satisfying the applicable standard. Id. at 1250; see also id. at 1255-1256 (Ervin J., concurring "in those portions of the majority opinion...denying O'Dell relief from his conviction").

On November 19, 1996, O'Dell applied to the Fourth Circuit for a stay of execution and the Warden opposed the motion. The Court of Appeals has not yet ruled on the application. O'Dell's execution is scheduled for December 18, 1996.

STATEMENT OF FACTS

The Supreme Court of Virginia summarized the evidence surrounding the murder and rape as follows:

> On Tuesday, February 5, 1985, the victim, Helen Schartner, left a night club in Virginia Beach known as the County Line Lounge about 11:30 p.m. O'Dell left the same club sometime between 11:30 p.m. and 11:45 p.m. The next day, February 6, 1985, Schartner's car was found in the parking lot of the County Line Lounge. Near 3:00 p.m. the same day, Schartner's body was discovered among the reeds in a field near a muddy area behind another club, across the highway from the County Line Lounge. Tracks from tires consistent with the tires on O'Dell's car were discovered in an area near Schartner's body.
>
> Schartner had been killed by manual strangulation. She also had eight separate wounds on her head caused by blows from a handgun equipped with a cylinder. These head wounds produced extensive bleeding. A handgun with a cylinder was seen in O'Dell's car about 10 days prior to the murder.
>
> Not more than two and a half hours after Schartner left the County Line Lounge, O'Dell entered a convenience store with blood on his face and hands, in his hair, and down the front of his clothes.
>
> Vaginal and anal swabs disclosed the presence of seminal fluid in the victim's vagina and anus containing enzymes consistent with those in O'Dell's seminal fluid.
>
> O'Dell had been living in the home of a woman friend, Connie Craig. Approximately a week before the murder, Craig ordered O'Dell from the premises. O'Dell called Craig about 7:00 a.m. on Wednesday, the morning after the murder, said that he had vomited blood all over his clothes,* and stated that he wanted to talk with her before he left for Florida.
>
> When O'Dell reached Craig's house at about 7:30 a.m., he said he wanted to sleep, and he slept until 9:30 or 10:00 o'clock that evening. When O'Dell awakened, he asked Craig how to remove the blood from his new blue-gray jacket.
>
> The next day, Thursday, about 1:00 p.m., O'Dell called Craig from his place of work and told her he had put his clothes in her garage, but he intended to take them out the following day. After the telephone conversation, Craig read the local newspaper's account of the murder of Schartner. The account said the victim had last been seen at the County Line Lounge. When Craig remembered that O'Dell customarily visited the County Line Lounge on Tuesday nights, "something clicked." Craig went to her garage and found a paper bag containing four pieces of bloody clothing, including a pair of jeans which also had mud on them. Craig brought these clothes into the house and called the police.
>
> Forensic evidence established that the dried blood on two of O'Dell's articles of clothing was the same type as Schartner's in each of the 11 blood classification systems analyzed. Only three out of a thousand persons are in this blood classification. O'Dell's blood was not the same type as Schartner's. O'Dell's car was later seized and searched, and dried blood found on objects in the car also had several enzyme markers consistent with Schartner's blood, but not O'Dell's.

---

* In an alibi inconsistent with the one he had given to Craig, O'Dell told the police the blood came from a nose bleed caused by being struck while attempting to stop a fight at another club on the night of February 5. [Footnote in original opinion].

> During his incarceration, O'Dell told Steven Watson, a fellow inmate, he had strangled Schartner after she refused to have sexual intercourse with him.

O'Dell, 234 Va. at 679-681, 364 S.E.2d at 495-496. The state court's recitation of the historical facts is binding on this Court. See 28 U.S.C. § 2254(e)(1); see also former § 2254(d); Sumner v. Mata, 449 U.S. 539, 545-547 (1981) (statutory presumption of correctness applies to state appellate court's findings of historical fact).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. THERE IS NO COMPELLING REASON TO REVIEW THE FOURTH CIRCUIT'S DECISION THAT SIMMONS IS A "NEW RULE."

The "compelling" reasons which support this Court's extraordinary exercise of its certiorari power are not present in this case: there is no conflict among the circuit courts; the Fourth Circuit's decision did not depart "from the accepted and usual course of judicial proceedings" or conflict with this Court's precedents; nor was the issue decided below "an important question" that should be settled by this Court. See Sup. Ct. R. 10.

A. The Courts of Appeals are unanimous.

The few circuit courts which have addressed the issue of whether the rule in Simmons v. South Carolina is retroactively applicable on federal collateral review, all have agreed with the Fourth Circuit that it is not. See Stewart v. Lane, 70 F.3d 955, 958, n.3 (7th Cir. 1995), cert. denied, 116 S.Ct. 2580 (1996); Johnson v. Scott, 68 F.3d 106, 111-112, n.11 (5th Cir. 1995), cert. denied, 116 S.Ct. 1358 (1996).[2] Given this unanimity, O'Dell's case presents no compelling reason to grant, or issue to resolve on, certiorari. See Sup. Ct. R. 10.[3]

Moreover, given the total absence of conflict among the courts of appeals, as well as the small number of circuits that even have had occasion to consider the issue, it would be premature to grant review on this issue at this time. "'The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of those lower courts.'" California v. Carney, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting), quoting Estreicher & Sexton, A Management Theory of the Supreme Court's Responsibilities: An

[2] Every state court that has addressed the issue also has found the "Simmons" rule inapplicable to cases which predated Simmons. See Mueller v. Murray, 252 Va. ___, ___ S.E.2d ___, 1996 Va. LEXIS 97 (Nov. 1, 1996) (applying this Court's "new rule" analysis to "Simmons" claim); Commonwealth v. Christy, 656 A.2d 877, 888-889 (Pa.) (same), cert. denied, 116 S.Ct. 194 (1995).

[3] O'Dell makes much of the fact that six of the thirteen judges of the Fourth Circuit dissented from the court's judgment that Simmons is a new rule. The internal split in the Fourth Circuit, however, is not the type of "split" among circuit courts that compels a grant of certiorari. See Sup.Ct.R. 10. Indeed, the Fourth Circuit only took this case en banc to ensure that the case received the "careful consideration" three members of this Court believed it was due. See O'Dell, 95 F.3d at 1218. O'Dell's "internal split" argument is a smokescreen to obscure the fact that a majority ***seven*** judges of the Fourth Circuit ruled against him on this issue and the fact that it is the majority that speaks for the Court of Appeals, just as it does for this Court. O'Dell's phantom "split" argument, therefore, cannot alter the fact that the Fourth Circuit's ruling is in agreement with the other circuits which have addressed the issue, and it only highlights the point that, in 1988, reasonable jurists could have disagreed over the question of whether a "Simmons" rule was dictated by precedent. See Butler v. McKellar, 494 U.S. 407, 415 (1990) (if outcome susceptible to debate then prohibited as "new rule"); Sawyer v. Smith, 497 U.S. 227, 234 (1990) (same).

Empirical Study, 59 N.Y.U.L.Rev. 677, 719 (1984).[4]

B. The retroactivity issue can affect only a small number of cases.

This Court noted in Simmons that "[o]nly two States other than South Carolina" had a sentencing system in 1994 that could be affected by its rule. See Simmons, 114 S.Ct. at 2196 n.8. This Court should not grant certiorari where, as here, the retroactivity issue can affect not only a small, finite number of cases, but a number that is certain to ***decrease*** with the passage of time.[5] See California v. Ramos, 463 U.S. 992, 1029-1031 (1983) (Stevens, J., dissenting) (certiorari should not be granted where decision can affect only California's death penalty procedures).

Moreover, as of April 24, 1996, the standard for reviewing claims brought in § 2254

[4] O'Dell points to two federal district court decisions which, he says, show a "conflict." These decisions, however, do not constitute grounds for granting certiorari. First, as lower level decisions, they cannot qualify as the final word from their respective circuits. See Sup.Ct.R. 10. Their opinions, in fact, make the case for denying certiorari on an issue that still is "percolating." Second, one of the cases, Spreitzer v. Peters, 1996 U.S.Dist. LEXIS 1189 (N.D. Ill. Feb. 5, 1996), is contrary to its own circuit precedent. See Stewart v. Lane, 70 F.3d 955, 958 n.3 (7th Cir. 1995), cert. denied, 116 S.Ct. 2580 (1996). And neither district court opinion even ***mentions*** the fact that authority from this Court existed at the time the criminal cases became final which was ***contrary*** to the rule later embraced in Simmons.

[5] O'Dell's attempt to pin his case to this Court's grant of certiorari in Lambrix v. Singletary should be rejected. In Lambrix, the Florida Supreme Court had approved a procedure by which an aggravating factor, invalid under Maynard v. Cartwright, 486 U.S. 356 (1988), nevertheless could be weighed by the sentencer. Lambrix, 72 F.3d 1500, 1503 (11th Cir. 1996). Despite the fact that this Court already had ruled in Espinosa v. Florida, 505 U.S. 1079 (1992), that such a procedure was impermissible under the Eighth Amendment, ***and already had ruled in Stringer v. Black, 503 U.S. 222 (1992), that Maynard was not a new rule and could be applied retroactively,*** the Eleventh Circuit held that Espinosa was a new rule and thereby inapplicable. 72 F.3d at 1503. Thus, it is at least arguable that the Eleventh Circuit's decision in Lambrix is directly contrary to what this Court already had held in Stringer. Obviously, O'Dell's case is different because this Court has not found it necessary to speak on the retroactivity of Simmons and the circuit courts which have addressed the issue all agree with the Fourth Circuit that it is not retroactive on collateral review.

proceedings is governed by the new provisions of the 1996 Antiterrorism and Effective Death Penalty Act. See Felker v. Turpin, 116 S.Ct. 2333 (1996). Pursuant to new § 2254(d), a federal court may not grant collateral relief on a claim that was adjudicated on its merits in state court unless the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Congress' implementation of a statute which governs what law applies to claims which were reviewed on their merits in state court thus limits any impact of the Fourth Circuit's decision in this case to O'Dell alone. In other words, this Court should not grant certiorari to elucidate an area of the law -- the "new rule" doctrine -- that is now a matter of statutory law.[6]

C. The Fourth Circuit's faithful application of the Caspari test presents no important issue for review.

The Fourth Circuit's analysis of the retroactivity issue in O'Dell is a straightforward application of this Court's settled standard. In Caspari v. Bohlen, 510 U.S. 383 (1994), the Court set out a three-part test to determine whether a case announced a new rule, and the Fourth Circuit painstakingly followed that test: the Court determined that O'Dell's case became final in 1988 and then "surveyed the legal landscape" in 1988. O'Dell, 95 F.3d at 1224 et seq. That survey entailed a meticulous analysis of whether a reasonable jurist in 1988 would have

[6] It is the Warden's position that new § 2254(d) applies to O'Dell's case and that he is not entitled to relief under either the old law or the new.

concluded that the rule announced in 1994 in Simmons was compelled.[7] A majority of the en banc Fourth Circuit concluded that "Simmons was the paradigmatic 'new rule,'" see 93 F.3d at 1218, and that the new rule did not qualify under either of the two extraordinary exceptions outlined in Caspari. See id. at 1238. There is nothing unsettled, unusual or unreasonable about the Fourth Circuit's application of Caspari's test.

Neither of the two cases upon which Simmons principally relied articulated the "Simmons" rule. In Gardner v. Florida, 430 U.S. 349 (1977), the Court held that reliance upon secret ***factual*** information in sentencing a defendant to death violates the Eighth Amendment, although not necessarily due process. Gardner, 430 U.S. at 364 (White, J., concurring); see Marks, 430 U.S. at 193. In Skipper v. South Carolina, 476 U.S. 1, 5 (1986), the Court held, under the Eighth Amendment, that ***factual*** evidence that the defendant would not pose a danger if given a life sentence -- in Skipper's case, his record of good behavior -- may not be excluded from the sentencer's consideration. To hold that either of these cases "compelled" the Simmons due process rule, especially when the rights identified in them were based upon the exclusion of evidence of a ***factual*** rather than a ***legal*** nature and primarily rested upon an Eighth Amendment analysis, would vitiate the "new rule" doctrine altogether. See Gray v. Netherland, 116 S.Ct. 2074, 2084 (1996) ("the new-rule doctrine 'would be meaningless if applied at this

[7] The Simmons rule comes from Justice O'Connor's concurrence: "Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury -- by either argument or instruction -- that he is parole ineligible." 114 S.E.2d at 2201 (O'Connor, J., concurring); see Marks v. United States, 430 U.S. 188, 193 (1977) (holding of case is position taken by concurrence on narrowest grounds); see also Simmons, 114 S.Ct. at 2193, n.4 (The rule is based exclusively on the Due Process Clause of the Fourteenth Amendment, the Court having expressly declined to decide whether the rule was required by the Eighth Amendment).

level of generality.'"), quoting Sawyer, 497 U.S. at 236.

The Fourth Circuit correctly concluded that, even if a reasonable jurist in 1988 would have felt that Gardner and Skipper supported the due process rule announced later in Simmons, this Court's decision in California v. Ramos, 463 U.S. 992 (1983), was diametrically opposed to such a conclusion.[8] In Ramos, the Court held that there was no Eighth Amendment or due process violation where a State chose to instruct the sentencing jury that the Governor could commute a sentence of life without parole but ***not*** to instruct that the Governor could also commute a death sentence. Id. at 1010-1011. The very argument later ***accepted*** in Simmons -- that an uninstructed jury was left with the misimpression that it must render a death sentence to keep the prisoner from returning to society -- ***expressly was rejected*** in Ramos, 463 U.S. at 1010-1011, in favor of a broad principle of deference to a State's decision as to what information it would give juries about matters of pardon and parole. Id. at 1013-1014 ("the wisdom of the decision to permit juror consideration of possible commutation is best left to the States").[9] In fact, Ramos expressly ***approved*** of the practice that many States like Virginia had

[8] Skipper was decided after Ramos but did not mention, much less overrule, it. Indeed, Justice O'Connor expressly distinguished the error in Simmons -- disallowing instruction on state's parole law -- from the error in Skipper -- disallowing facts to rebut future dangerousness. See Simmons, 114 S.Ct. at 2200 (O'Connor, J., concurring).

[9] In addition to the Ramos decision, the decision in Caldwell v. Mississippi, 472 U.S. 320 (1985), which had restated the principle that States can choose whether to instruct juries on post-conviction procedures, still was valid law at the time O'Dell's case became final in 1988. See 472 U.S. at 342 (O'Connor, J., concurring); see also Romano v. Oklahoma, 512 U.S. 1, 114 S.Ct. 2004, 2010 (1994) (Justice O'Connor's opinion in Caldwell is "controlling").

of prohibiting the presentation of pardon and parole information to juries. Id. at 1013 n.30.[10]

In 1988, ***no authority anywhere*** had held it a constitutional violation for a State to prohibit the disclosure of parole information to juries. Not until Simmons did such a rule exist. Of course, as the Fourth Circuit observed, Virginia's pre-Simmons rule against the disclosure of parole information quite reasonably had relied on Ramos for its validity. See, e.g., Mueller v. Commonwealth, 244 Va. 386, 409, 422 S.E.2d 380, 394 (1992), cert. denied, 507 U.S. 1043 (1993); Peterson v. Murray, 904 F.2d 882, 886-887 (4th Cir.) (agreeing with Virginia Supreme Court), cert. denied, 498 U.S. 992 (1990). The Fifth Circuit also agreed with this conclusion. See Knox v. Collins, 928 F.2d 657, 660 (5th Cir. 1991).

It simply cannot be said that the decisions of the Virginia Supreme Court, the Fourth Circuit and the Fifth Circuit were "objectively unreasonable," see Stringer v. Black, 503 U.S. at 237, given this Court's express approval of the rule against disclosure of parole information found in Ramos, and the lack of a contrary ruling in any other case in 1988. O'Dell's detailed discussion of the issue (Pet. at 9-15) completely misses the point. Indeed, instead of an analysis of what a reasonable jurist could have decided in 1988, the petitioner advances nothing more than an argument for the adoption of the "Simmons" rule. That battle, however, already has been fought and decided. The Fourth Circuit's thorough and meticulous application of this Court's settled retroactivity standard to the relevant issue of whether O'Dell may receive the benefit of a rule which did not exist in 1988, simply presents no compelling reason to grant

[10] As the Fourth Circuit noted, 95 F.3d at 1227-1228, the ***entire*** Court in Ramos agreed on this principle of deference, as is evidenced by the fact that the dissenting opinions were based upon the belief that the Constitution ***forbade altogether*** any mention to juries of pardon or parole matters. See 463 U.S. at 1021-1023 (Marshall, J., dissenting); id., at 1028-1029 (Blackmun, J., dissenting); id. at 1029-1031 (Stevens, J., dissenting).

certiorari.

D. Certiorari should not be granted merely to decide whether the "Simmons" new rule satisfies an exception under Teague.

O'Dell tacitly concedes that the "Simmons" new rule does not satisfy Teague's first exception that would allow its retroactive application: O'Dell is subject to imprisonment and punishment for capital murder regardless of whether he was entitled to an instruction on Virginia's parole law. See Caspari, 114 S.Ct. at 956. The new rule, therefore, does not place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Id., quoting Teague v. Lane, 489 U.S. 288, 307 (1989).

O'Dell's weak attempt, moreover, to place his case within the second exception for "watershed rules of criminal procedure," see Teague, 489 U.S. at 311, cannot constitute the kind of compelling reason this Court requires to review a case. O'Dell denigrates the Fourth Circuit's conclusion that the new rule in Simmons is not "on par with the rule announced in Gideon v. Wainwright," see O'Dell, 95 F.3d at 1239, yet, given this Court's clear restriction on the exception to rules which are "on par" with Gideon, the Fourth Circuit's analysis was precisely correct. See Gray v. Netherland, 116 S.Ct. 2074, 2085 (1996) (rule that capital defendant entitled to notice of evidence used against him to prove future dangerousness "has none of the primacy and centrality of the rule adopted in Gideon"), quoting Saffle v. Parks, 494 U.S. 484, 495 (1990).

Indeed, the "Simmons" new rule is even less "on par" with Gideon than the rule at issue in Gray. Under Simmons, there is no categorical, automatic requirement that the jury be instructed about the defendant's parole status: the new rule does not even apply unless (1) the prosecution argues in favor of a finding of "future dangerousness," (2) the defendant in fact will

be ineligible for parole and (3) ***the defendant requests that the jury be instructed.*** See Simmons, 114 S.Ct. at 2201 (O'Connor, J., concurring) (the rule entitles the defendant to be ***allowed*** to inform the jury). Certainly, the "bedrock," Gideon-like exception to the "new rule" doctrine is not met by the evidentiary, fact and procedure-dependent new rule announced in Simmons. See Graham v. Collins, 506 U.S. 461, 478 (1993) (exception for "small core of rules"); Sawyer, 497 U.S. at 242 (rule must "alter our understanding of the bedrock procedural elements"); Teague, 489 U.S. at 313 (rule would be "central to an accurate determination of innocence or guilt" and "it is unlikely that many such components of basic due process have yet to emerge").

The new rule announced in Simmons was merely an unexpected refinement of this Court's evidentiary requirements in capital sentencing. In view of the fact that this Court ***never*** has found a new rule to satisfy the "bedrock" exception, this Court should not grant certiorari merely to address whether the Fourth Circuit properly found that the Simmons rule was not a new Gideon.

E. O'Dell's parole status played no part in the jury's determination of sentence.

Certiorari also should not be granted in this case because, even if it is assumed for the sake of argument that O'Dell was entitled to a "no parole" instruction, it cannot be said that the omission had a "substantial and injurious effect or influence in determining the jury's verdict." See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). First, unlike Simmons, here there is no indication that the jury considered the possibility that O'Dell would be paroled. See Simmons, 114 S.Ct. at 2192 (jurors asked whether Simmons would be eligible for parole). Indeed, O'Dell's jury only deliberated for ***one hour*** before returning its sentencing verdict. (JA 2505).

Second, as the Fourth Circuit correctly stated, the harmlessness is apparent from "the heinousness of the crime, O'Dell's lengthy and frightening criminal record,[11] and O'Dell's own testimony from the stand that he would spend the rest of his life behind bars." O'Dell, 95 F.3d at 1239, n.14.

Finally, the jury's verdict was based not only on O'Dell's unquestionable dangerousness, but also on its independent finding that O'Dell's conduct "was outrageously wanton, vile or inhuman and it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." Id. See Tuggle v. Netherland, 79 F.3d 1386, 1395 (4th Cir.) (the "Ake" error had no effect on the jury's independent finding of "vileness"), cert. denied, 117 S.Ct. 237 (1996). The record in this case simply does not permit a conclusion that the lack of a "Simmons" instruction had the "substantial and injurious effect" required by Brecht. Certiorari review certainly is inappropriate in a case where, regardless of whether a "new rule" may be applied, the rule clearly cannot lead to relief for the petitioner.

II. O'DELL'S "ACTUAL INNOCENCE" ISSUE IS NOT A BASIS FOR CERTIORARI REVIEW.

O'Dell argues that his defaulted claims should have been addressed because he allegedly is "innocent." This fact-specific issue was resolved against O'Dell ***by a unanimous en banc***

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[11] At the age of thirteen, O'Dell committed a breaking and entering. During his teen years, he committed five auto thefts, three assaults, a threatening of bodily harm and an attempted escape. As an adult, he was convicted of five armed robberies and five unauthorized uses of an automobile. In prison, he was convicted of second-degree murder. On parole, he was convicted of a kidnapping and robbery in which he had brutally attacked his victim. On parole once again, he murdered Helen Schartner. O'Dell, 95 F.3d at 1220.

Fourth Circuit Court of Appeals and certainly presents no issue meriting certiorari review.[12] See Sup.Ct. R. 10 ("certiorari is rarely granted" to review "the misapplication of a properly stated rule of law" to the particular facts of a case"); Kyles v. Whitley, 115 S.Ct. 1555, 1578 (1995) (Scalia, J., dissenting) ("an intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err [is] precisely the type of case in which we are ***most*** inclined to deny certiorari") (emphasis in original).

The Fourth Circuit determined the issue, moreover, only after it "painstakingly canvassed the record [and] carefully consider[ed] every claim." O'Dell, 95 F.3d at 1218, 1239-1246.[13] This determination was merely an application of settled law to highly case-specific facts. See United States v. Johnson, 268 U.S. 220, 227 (1925) (certiorari not available "to review evidence and discuss specific facts"); see also Texas v. Mead, 465 U.S. 1041 (1984) (Stevens, J., respecting the denial of certiorari) (same). Faithful to Schlup v. Delo, 115 S.Ct. 851, 867 (1995), the Fourth Circuit found that O'Dell had failed to establish that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." O'Dell, 95 F.3d at 1246-1254. Indeed, the entire en banc Court of Appeals found the "mountain

[12] The dissenting judges of the en banc Court of Appeals dissented only from the majority's analysis of the Simmons/new rule issue. The dissenters expressly ***concurred*** in the affirmance of the district court's denial of relief on the default/"innocence" claims, a denial made after a full evidentiary hearing on O'Dell's "new" evidence of "innocence." See O'Dell, 95 F.3d at 1255-1256, 1263.

[13] The reason the full Court gave such exhaustive attention to the case was because three members of this Court had expressed concern over O'Dell's guilt in their opinion respecting the denial of certiorari from state habeas review. 95 F.3d at 1218. That concern was a direct result of O'Dell's gross misrepresentation of the evidence, specifically his decision not to inform this Court that his own experts had matched DNA on his jacket to the DNA of his victim. This fact was not revealed until the federal habeas proceedings.

of circumstantial evidence"[14] compelled its conclusion:

> We do not believe it can even remotely be claimed that O'Dell has established that it is more likely than not that ***no*** reasonable juror would have convicted him. The only thing that O'Dell has demonstrated is that ***one*** of the many blood stains on his clothing did not come from either himself or Helen Schartner; that he also had someone else's blood on his shirt by no means shows that he did not murder Helen Schartner, particularly in light of the vast other evidence that he did. We therefore hold that O'Dell has not passed through the "narrow" gateway of actual innocence, and so are barred from reviewing his procedurally defaulted claims on federal ***habeas***.

Id. at 1254 (emphases in original).

In sum, the Fourth Circuit's thorough factual analysis of O'Dell's claim of innocence is not the type of decision this Court reviews on certiorari. The Court of Appeals merely applied settled precedent to the facts of this particular case and correctly concluded that O'Dell was not entitled to relief. That unanimous decision of thirteen court of appeals judges presents no

[14] The evidence was, indeed, a "mountain:" blood stains on O'Dell's two jackets, his shirt, his jeans, a cloth, a sardine can and the right and left seat backs, seat cover and rear floormat of O'Dell's car all matched the blood of the victim. 95 F.3d at 1247. Further, O'Dell was seen leaving the bar shortly after the victim left and lied about the reasons he was covered in blood after the murder. Id. at 1250-1251. The victim had been beaten with an object consistent with a gun in O'Dell's possession and tire tracks from his car were left at the scene. Id. The victim's head and pubic hairs were found in O'Dell's car and seminal fluid and sperm consistent with O'Dell's were recovered from the victim's vagina and anus. Id. at 1251-1252. O'Dell also confessed his crime to another inmate while awaiting trial. Id. at 1252. And ***O'Dell's*** own post-trial retesting of the evidence by Lifecodes, Inc. demonstrated a DNA match between the blood on his jacket and the victim's blood. Id. at 1253.

No amount of reconfiguring of the facts by O'Dell can hide the fact that his own DNA experts matched the blood on his jacket to the blood of Helen Schartner. Again, it is that critical fact that O'Dell ***deliberately withheld from this Court*** when he filed his previous certiorari petition, and that, no doubt, caused three members of this Court to express doubt about O'Dell's guilt in their opinion respecting the denial of certiorari from state habeas review. Once the truth was revealed during the federal habeas proceeding -- that both Lifecodes and the Commonwealth's expert agreed that DNA on the jacket matched the DNA of the victim --, not one of the thirteen members of the Fourth Circuit had a doubt about O'Dell's guilt.

compelling reason for review.[15]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. D. NETHERLAND, WARDEN, et al.,
Respondents herein.

By: _____
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[15] O'Dell misrepresents the facts throughout his petition. Indeed, he even improperly includes ***eight additional pages*** of inaccurate factual argument in his appendix. (Pet. App. Vol. II, pp. 187a - 193a). The accurate record of facts is recounted in the Fourth Circuit's opinion. One of the most flagrant examples of misrepresentation is O'Dell's reference to a ***newspaper article*** which reports that Steven Watson, a Commonwealth's witness to whom O'Dell confessed, recanted his trial testimony in "a detailed and persuasive affidavit." (Pet. at 22, 28 n. 14). O'Dell does not inform this Court that witness Watson "recanted" his trial testimony only after being harassed for several days by O'Dell's representatives. Steven Watson, however, since has reaffirmed the truth of his trial testimony to State officials, volunteered to the Commonwealth the circumstances and tactics used by O'Dell to extract the reported "recantation," and sought the assistance of the Commonwealth in fending off further harassment from O'Dell.

COMMONWEALTH of VIRGINIA

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December 3, 1996

The Honorable William K. Suter, Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: O'Dell v. Netherland
No. 96-6867

Dear Mr. Suter:

Please find enclosed the original and ten copies of the Respondents' Brief in Opposition, to be filed on behalf of the respondents in the above-referenced case.

Thank you for your assistance in this matter.

Very truly yours,

Katherine P. Baldwin
Assistant Attorney General
Criminal Litigation Section

Enclosures

3:61/234

cc: Robert S. Smith, Esquire

No. 96-6867

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

JOSEPH ROGER O'DELL, III

Petitioner

v.

J. D. NETHERLAND, WARDEN, et al.

Respondents

RESPONDENTS' CERTIFICATE OF SERVICE

I certify that I am a member of the bar of this Court and that on December 3, 1996, I mailed, by Federal Express, a copy of the Warden's Brief in Opposition to Robert S. Smith, Paul, Weiss, Rifkind, Wharton & Garrison, 1285 Avenue of the Americas, New York, NY 10019-6064, counsel for the petitioner.

Katherine P. Baldwin
Assistant Attorney General

No. 96-6867

In the Supreme Court of the United States

October Term, 1996

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

J.D. NETHERLAND, Warden, Mecklenburg Correctional Center; RONALD J. ANGELONE, Director, Virginia Department of Corrections; JAMES S. GILMORE, III, Attorney General of the Commonwealth of Virginia; COMMONWEALTH OF VIRGINIA,

Respondents.

REPLY BRIEF OF PETITIONER

IMMINENT EXECUTION SCHEDULED FOR DECEMBER 18, 1996

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December 11, 1996

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TABLE OF AUTHORITIES

REPLY BRIEF FOR PETITIONER

For the reasons discussed below, none of the arguments advanced by the Commonwealth in its opposition brief justify denying review of O'Dell's petition for certiorari.

O'Dell is scheduled to be executed in just seven days.[1/] No case will present these important questions any more starkly or urgently.

I.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER *SIMMONS* ANNOUNCED A NEW RULE FOR PURPOSES OF *TEAGUE*

A. No Other Federal Court Agrees With the Fourth Circuit Majority on the *Teague* Issue Presented Here

At the outset of its opposition brief, the Commonwealth asserts that "all the circuit courts . . . that have addressed the issue agree with the Fourth Circuit that the law at the time O'Dell's case became final did not 'compel' the rule in *Simmons*." Opp. Br., "Questions Presented." Even the majority below, however, did not claim that any court of appeals has addressed, much less agreed with it on, this issue. In truth, as the dissenters pointed out, there is "no authority from other federal appellate courts that addresses squarely the issue before us." 95 F.3d at 1257 n.4. (App. 86a.)

Even a cursory look at the two court of appeals decisions cited by the Commonwealth shows that they involved different questions. The first decision, *Stewart* v. *Lane*, 70 F.3d 955 (7th Cir. 1995), *supplementing* 60 F.3d 296, *cert. denied*, 116 S. Ct. 2580 (1996), addressed whether, for purposes of *Teague* v. *Lane*, 489 U.S. 288 (1989), *Simmons* v. *South Carolina*, 114 S. Ct. 2187 (1994), announced a new rule for a conviction that became final *prior to* this Court's decision in *Skipper* v. *South Carolina*, 476 U.S. 1 (1986). Indeed, in its initial decision in *Stewart* -- a decision the Commonwealth neglects to cite -- the Seventh Circuit expressly *distinguished* the situation presented here, where the conviction at issue became final *after Skipper*. 60 F.3d at 302 n.4. And, as noted in the Petition, Pet. 8, the Seventh Circuit went so far as to opine that, in this case, the opposite result should obtain, because "it is arguable that *Skipper* compels the result in *Simmons*." *Id.*

The second decision cited by the Commonwealth, *Johnson* v. *Scott*, 68 F.3d 106 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1358 (1996), is no more relevant. In *Johnson*, the petitioner was sentenced under Texas law, which, unlike Virginia law, did not provide for life imprisonment without the possibility of parole. *Id.* at 111. There, the petitioner sought an *extension* of *Simmons*, that, whatever its validity today, could not have been thought compelled at the time of the petitioner's conviction. *Id.* Here, by contrast, there is no question that the precise rule announced in *Simmons* would invalidate O'Dell's sentence.[2/]

1/ Yesterday, O'Dell applied in this Court for a stay of execution. As noted in the Petition, Pet. 5 n.2, O'Dell sought a stay from the court of appeals three weeks ago. Yesterday, the court of appeals denied the stay by a 7-6 vote.

2/ The Commonwealth also relies on decisions of two state supreme courts. Opp. Br. 6 n.2. However, because *Teague* involves a question of federal law applicable to federal habeas proceedings, state court decisions on this issue are, at best, merely persuasive authority.

The two decisions cited by the Commonwealth do not rise even to that level. In *Mueller* v. *Murray*, 1996 WL 631758 (Va. Nov. 1, 1996), the Virginia court simply adopted the view of the majority opinion of the Fourth Circuit, without any independent analysis. *See id.* at *6. In *Commonwealth* v. *Christy*, 656 A.2d 877, 888-89 (Pa.), *cert. denied*, 116 S. Ct. 194 (1995), the Pennsylvania court concluded that, even if *Simmons* were compelled by this Court's prior precedents, it announced a new rule under Pennsylvania law. *Id.* at 889 n.22.

(continued...)

In fact, there is a "unanimity" of judicial opinion on the issue presented here, as the Commonwealth asserts. Opp. Br. 6. But, as noted in the Petition, Pet. 8, it is *contrary* to the majority's decision below. *See Carpenter* v. *Vaughn*, 888 F. Supp. 658, 665-66 (M.D. Pa. 1995); *Spreitzer* v. *Peters*, 1996 WL 48585, at *5-*6 (N.D. Ill. Feb. 5, 1996).[y]

Further, contrary to the Commonwealth's assertion, it is not "premature" to grant review of the *Teague* issue at this time. Opp. Br. 6. That issue is squarely presented in this case, and the majority and dissenting opinions below articulated the opposing arguments. This Court should not, as the Commonwealth recommends, allow further "percolation" of this issue in the federal courts, Opp. Br. at 6, where "percolation" of this issue means the carrying out of death sentences imposed on a legally suspect basis. Such "percolation" would serve no useful purpose here.

B. The Question Presented Is an Important One

Notwithstanding its prediction of additional "percolation" of the *Teague* issue in the federal courts, the Commonwealth argues that review is inappropriate here because the retroactivity issue will affect "not only a small, finite number of cases, but

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[y] (...continued)
It is significant that the same federal district court that earlier held to the contrary in *Carpenter* v. *Vaughn*, 888 F. Supp. 658, 665-66 (M.D. Pa. 1995), expressly rejected *Christy* for purposes of federal habeas proceedings, and adhered to its earlier ruling. *Banks* v. *Horn*, 928 F. Supp. 512, 518 (M.D. Pa. 1996).

[y] The Commonwealth makes no attempt to refute or distinguish these considered decisions, except to dismiss them as district court decisions and, in the case of *Spreitzer*, to suggest that it is "contrary to its own circuit precedent" of *Stewart*. Opp. Br. 7 n.4. *Spreitzer*, however, expressly distinguished the Seventh Circuit's previous decision in *Stewart* on exactly the same grounds that the Seventh Circuit itself distinguished *Stewart* from this case, i.e., that the conviction in *Stewart* became final *prior to* this Court's decision in *Skipper*. *See Spreitzer*, 1996 WL 48585, at *4-*6.

a number that is certain to ***decrease*** with the passage of time." Opp. Br. 7 (emphasis in original).

In this regard, the Commonwealth points out that, as this Court itself noted in *Simmons*, only two states other than Virginia had a sentencing system like the one at issue here. Opp. Br. 7 (quoting *Simmons*, 114 S. Ct. at 2196 n.8). Thus, the Commonwealth makes the odd argument that the aberrational nature of Virginia's sentencing system militates *against* review by this Court. Nevertheless, even the Commonwealth's premise is mistaken. As noted above, there are already two other reported federal cases raising the same issue as O'Dell, and, as stated in the Petition, counsel is aware of at least two pending cases in Virginia alone that raise the same question. Pet. 8 n.5.

In contending that the number of cases raising this issue "is certain to ***decrease*** with the passage of time," Opp. Br. 7 (emphasis in original), the Commonwealth presumably means that this is a retroactivity issue. This case, however, concerns not only the *result* of this retroactivity question, but also the unprecedented "fact/law" construct that led the majority below to reach this result. That construct will bind the lower courts on every *Teague* issue within the Fourth Circuit and, as shown in the Petition, it is at odds with the interpretation of *Teague* enunciated by this Court and other Circuits. *See* Pet. 15.

C. *Ramos* Does Not Support the Fourth Circuit Majority's Decision

In defending the majority's purportedly "straightforward" application of *Teague*, Opp. Br. 8, the Commonwealth, like the majority itself, is forced to go to

extreme lengths to avoid the obvious -- and expressed -- conclusion that *Simmons* was "compelled" by *Gardner* v. *Florida*, 430 U.S. 349 (1977), and *Skipper*.

Thus, the Commonwealth embraces the unprecedented "fact/law" distinction posited by the majority, Opp. Br. 9, even though the Commonwealth never suggested such a distinction in the proceedings below. The Commonwealth, however, does not even attempt to defend this artificial distinction in the face of the deficiencies outlined in the Petition. *See* Pet. 13-14.

Instead, the Commonwealth relies principally on this Court's decision in *California* v. *Ramos*, 463 U.S. 992 (1983). In the process, it distorts the significance of that decision even further than the majority. Thus, the Commonwealth asserts that "[t]he very argument later ***accepted*** in *Simmons* . . . ***expressly was rejected*** in *Ramos*," and that *Ramos* was "***contrary*** to the rule later embraced in Simmons." Opp. Br. 10, 7 n.4 (emphasis in original). Indeed, echoing the majority's remarkable claim that a reasonable jurist would have thought it "all but a certainty that the rule of *Simmons* was not only *not* compelled, but *forbidden*" by *Ramos*, 95 F.3d at 1231-32 (App. 31a) (emphasis added), the Commonwealth asserts that *Ramos* was "diametrically opposed" to a conclusion that "*Gardner* and *Skipper* supported the due process rule announced later in *Simmons*." Opp. Br. 10.

However, as discussed in the Petition, *Ramos* is entirely consistent with this Court's previous decision in *Gardner* and its subsequent decisions in *Skipper* and *Simmons*. *See* Pet. 11-14. Certainly, this Court did not suggest in *Skipper* or *Simmons* that these decisions stood in any "tension" with *Ramos*, much less that they were in any

way "opposed" or "contrary" to it.[4] Nor did this Court in *Ramos* perceive any "tension" between it and *Gardner;* indeed, *Ramos* expressly recognized that, as previously held in *Gardner,* when the prosecution puts "inaccurate information" before the sentencer, the defendant has a right to "explain or deny" it. *Ramos*, 463 U.S. at 1004.

In short, the Commonwealth's opposition brief only demonstrates that, at a minimum, there is substantial reason to question the correctness of the majority's determination of the *Teague* issue, and that this issue is an important one, both in its own right and in its implications for the continuing application of *Teague* by the lower courts.[5]

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[4] The Commonwealth itself admitted during oral argument in the court of appeals that "[t]hey did not have to overrule *Ramos* to write the *Simmons* opinion." 95 F.3d at 1260 (dissenting opinion, quoting the Commonwealth). (App. 93a).

[5] The Commonwealth dismisses as a "smokescreen" the fact that the court of appeals split 7-6 on this issue. Opp. Br. 6 n.3. Indeed, the Commonwealth incongruously contends that this split "only highlights the point that, in 1988, reasonable jurists could have disagreed over the question of whether a '*Simmons*' rule was dictated by precedent." Opp. Br. 6 n.3. Of course, the issue that divided the court of appeals was whether a reasonable jurist *in 1988* could have thought that the rule in *Simmons* was compelled by *Gardner* and *Skipper*, not whether a reasonable jurist *today* could come to different conclusion on that issue.

The Commonwealth also suggests that, even if the rule of *Simmons* were applicable here, any constitutional error would have been harmless. Opp. Br. 13-14. The majority, however, expressly declined to rest its decision on this ground. 95 F.3d at 1239 n.14. (App. 46a). As the dissenters explained in detail, the *Simmons* violation in this case cannot reasonably be considered harmless. *Id.* at 1261-62. (App. 95a-97a).

II.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER *SIMMONS* FALLS WITHIN THE SECOND EXCEPTION TO *TEAGUE*

According to the Commonwealth, the rule of *Simmons* does not fall within the second exception to *Teague* because it is merely "an unexpected refinement of this Court's evidentiary requirements in capital sentencing," and one that is "evidentiary, fact and procedure-dependent." Opp. Br. 13.

Yet, the concurring Justices in *Simmons* joined in reversing the conviction there expressly because it is a "hallmark[] of due process" that any capital or non-capital defendant is entitled to "meet the State's case against him." *Simmons*, 114 S. Ct. at 2200 (O'Connor, J., concurring).

Although the rule announced in *Simmons*, like all legal rules, arose out of a particular set of factual circumstances, that in no way detracts from its stature as a rule that implicates "the fundamental fairness and the accuracy of the criminal proceeding." *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990). The Commonwealth does not -- and could not -- suggest that *Simmons* fails to protect a capital defendant against a misinformed and mistaken decision that could cost him his life.

III.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER THE DNA EVIDENCE IS A SUFFICIENT SHOWING OF ACTUAL INNOCENCE UNDER *SCHLUP*

A. Certiorari May Appropriately Be Granted to Review O'Dell's Claim of Actual Innocence

The Commonwealth opposes certiorari for O'Dell's actual innocence claim on the ground that the court of appeals below "merely applied settled precedent to the facts of this particular case," and therefore this is "not the type of decision this Court reviews on certiorari." Opp. Br. 16.

Contrary to the Commonwealth's characterization of the court of appeals' determination, this was not a "routine" application of a "firmly established 'actual innocence' standard." Opp. Br., "Questions Presented." The court of appeals insisted on applying the new *Schlup* standard itself, rather than allowing the district court to apply it in the first instance. In doing so, the court of appeals misapplied it. *See* Pet. 26-27. Moreover, as discussed in the Petition, the court of appeals made numerous factual errors and misleading characterizations of the factual record. *See* Pet. 18-23; *see generally* App. Vol. II.

Under the circumstances, we respectfully submit, this Court may appropriately exercise its certiorari power to ensure that O'Dell's actual innocence claim receives the "meaningful federal habeas review" that it deserves. *O'Dell* v. *Thompson*, 502 U.S. 995, 995 (1991) (Statement of Blackmun, J., joined by Justices Stevens and O'Connor). (App. 176a).

B. O'Dell Did Not Misrepresent the Results of the DNA Testing

Despite its rhetoric, the Commonwealth never confronts the fundamental fact that, as the district court expressly found, the DNA testing shows that the only meaningful blood evidence is *exculpatory*: the blood on the shirt "could not have come from Schartner" (App. 102a), and no determination about the blood on the jacket can be made. 95 F.3d at 1249. (App. 68a, 128a.) When presented with this evidence after the denial of state habeas relief, three Members of this Court observed that it "raises serious questions about whether petitioner was guilty of the charged crime." *O'Dell*, 502 U.S. at 995. (App. 176a.)

Rather than addressing the merits of the DNA evidence, the Commonwealth repeatedly charges that O'Dell "grossly misrepresented the facts of his case" in his earlier petition and "***deliberately withheld from this Court***" "crucial information" about the DNA evidence. Opp. Br. 1, 15 n.13, 16 n.14 (emphasis in original). The Commonwealth's accusations are entirely baseless.[6/]

The Commonwealth asserts that "***O'Dell's*** own post-trial retesting of the evidence by LifeCodes, Inc. demonstrated a DNA match between the blood on his jacket and the victim's blood," and that this "critical fact," "no doubt, caused three members of this Court to express doubt about O'Dell's guilt." Opp. Br. 16 n.14 (emphasis in original). Yet, after holding an evidentiary hearing on the question, the district court below accepted the results of the LifeCodes tests (i.e., the reported measurements for each of the bands), but expressly rejected LifeCodes' *interpretation* of those results as

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[6/] Counsel of record for the Commonwealth is an attorney who has not appeared in this case before, and her zeal appears to exceed her grasp of the relevant facts.

they related to the jacket. (App. 128a.) As shown in the Petition, LifeCodes' *interpretation* was faulty because it purported to "correct" for band shifting using a controversial procedure that has been rejected by other laboratories and the scientific community. *See* Pet. 28 n. 13; *see also Hayes* v. *Florida*, 660 So. 2d 257, 264 (Fla. 1995) (holding DNA "match" obtained by LifeCodes using band shifting "inadmissible as a matter of law"). After hearing opposing experts on the question and reviewing all the DNA evidence, the district court agreed with O'Dell's interpretation of the results. (App. 128a.)

The court of appeals did not -- and could not -- hold the district court's finding of fact regarding the DNA testing to be clearly erroneous. Nor does the experts' dispute about the jacket detract from the undisputed fact that "[t]he Commonwealth's experts agreed that the DNA tests proved that the blood on O'Dell's *shirt* came from neither Schartner nor O'Dell." 95 F.3d at 1248. (App. 67a) (emphasis added).

As explained in the Petition, *see* Pet. 27-28, the district court's undisturbed factual findings regarding the DNA testing undermine all of the admittedly "circumstantial evidence" presented by the Commonwealth. Opp. Br. 16. Moreover, this supposed "mountain of circumstantial evidence," Opp. Br. 16, is, truly, a molehill: the court of appeals' recitation of the facts is riddled with errors and mischaracterizations, which are set forth at length in the Petition and Volume II of the Appendix.[7/]

[7/] Although the Commonwealth claims that the summary of factual errors in the court of appeals' decision contained in Volume II of the Appendix was "improper[]," Opp. Br. 17 n.15, it does not explain why that is so. Moreover, although the Commonwealth claims that (continued...)

O'Dell's claim that the court of appeals misapplied the *Schlup* standard in his case merits review by this Court. At a minimum, O'Dell deserves a full evidentiary hearing on his claim of actual innocence.

CONCLUSION

For the foregoing reasons, and the reasons previously stated, the petition for certiorari should be granted.

Dated: December 11, 1996

Respectfully submitted,

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7/ (...continued)
the summary is "inaccurate" and "[t]he accurate record of facts is recounted in the Fourth Circuit's opinion," *id.*, it does not bother to challenge specifically even a single factual statement made in Volume II.

Similarly, the Commonwealth charges that "O'Dell misrepresents the facts throughout his petition." *Id.* The only example the Commonwealth offers, however, is of Steven Watson's subsequent recantation of his trial testimony. *Id.* After tacitly criticizing O'Dell for asking the Court to take judicial notice of a published newspaper article reporting Watson's recantation, the Commonwealth goes on to make a number of unsworn assertions regarding Watson's purported retraction of his recantation. *Id.*

The Petition directed the Court's attention to the newspaper article in order to avoid enlarging the factual record on appeal. Pet. 28 n.14. Whatever the truth of the Commonwealth's latest allegations regarding Watson, no reasonable jury, had it known of all the evidence concerning Watson's veracity, could have convicted O'Dell on the basis of his testimony.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Paul H. Schoeman, being duly sworn, deposes and says:

1. I am not a party to the action, am over the age of 18, and am employed by Paul, Weiss, Rifkind, Wharton & Garrison, 1285 Avenue of the Americas, New York, NY 10019.

2. On Wednesday, December 11, 1996, I served one (1) copy of the attached REPLY BRIEF OF THE PETITIONER on:

Katherine Baldwin
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900 Main Street
Richmond, VA 23219
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3. I made such service by personally enclosing a true copy of the aforementioned document in a properly addressed, postage paid wrapper and depositing it into a depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Paul H. Schoeman

Sworn to before me this
11th day of December, 1996

Notary Public
NORMA SOTO
Notary Public, State of New York
No. 41-4693337
Qualified in New York County
Commission Expires June 22, 1997

(5)

A - 424
No. 96-6867

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

JOSEPH ROGER O'DELL, III

Petitioner

v.

J. D. NETHERLAND, WARDEN, et al.

Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY

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RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY

The petitioner argues in reply to the respondents' brief in opposition that the Fourth Circuit's decision was flawed because state courts in 1988 somehow were on notice that the rule announced in Simmons v. South Carolina, 512 U.S. 154 (1994), was required six years before. This position is wrong, not only for the reasons already given in the respondent's brief in opposition, but also for the reason ***Jonathan Dale Simmons himself gave to this Court in 1994 when he presented his case***.

In Simmons, the death-sentenced inmate argued eloquently ***for a change in the law***:

> In California v. Ramos, 463 U.S. 992 (1983), the Court noted that many states prohibit capital sentencing juries from considering the availability of parole, pardon or commutation. 463 U.S. at 1013 n.30. These state law rules developed in an era when release on parole was widely available for life-sentenced murderers, and the various states' prohibitions against instructions or jury argument concerning parole were designed to protect capital defendants from jury speculation concerning the likelihood of early parole release if the death penalty was not imposed. ***In recent years,*** however, with the steady expansion of "life without parole" statutes, parole for life-sentenced murderers has increasingly moved from a real possibility to a jury-room myth, unfounded in reality but ever-present in the deliberations of capital sentencing juries. And with this change, rules that once protected capital defendants from potentially harmful speculation now serve to increase the danger of death sentences based on jurors' misinformed fear of parole release. This case illustrates in stark form the unfairness that can result when the crucial fact of a defendant's lifelong parole ineligibility is withheld from the jury that must sentence him.

Simmons v. South Carolina, No. 92-9059, Brief for Petitioner at 16-17 (excerpt appended to this brief). Simmons' argument that "rules that once protected capital defendants" should be changed, is an obvious recognition by the very proponent of the "Simmons" rule that the rule he sought was "new."

In fact, Simmons even argued to this Court that an exception to his proposed new rule might make sense in States (like Virginia) where the Governor retains the power of commutation. Simmons v. South Carolina, No. 92-9059, Brief for Petitioner at 51, n.28 (excerpt appended to this brief). See Va. Const. Art. V § 12; Va. Code §§ 53.1-229, 230; Lee v. Murphy, 63 Va. (22 Gratt.) 789 (1872). The theory behind this argument was that a jury might be misled into thinking the defendant could not be released from prison by an instruction that he would be ineligible for parole if, in fact, the Governor could commute his sentence. The authority Simmons expressly relied on for his suggested exception, as well as for his recognition of the established practice he was asking this Court to change, was California v. Ramos, 463 U.S. 992 (1983): the very case the Fourth Circuit relied on to demonstrate that, in 1988, the "Simmons" rule was not dictated by existing precedent.

Inmate Simmons did not believe in 1994 that the rule he sought was compelled or dictated, and no federal appeals court or state supreme court thinks so now. This concordant evidence demonstrates both the correctness of the Fourth Circuit's conclusion in O'Dell's case and the lack of any compelling basis for certiorari review.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 92-9059

JONATHAN DALE SIMMONS,

Petitioner,

v.

SOUTH CAROLINA,

Respondent

On Writ of Certiorari
To the Supreme Court of South Carolina

BRIEF FOR PETITIONER

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in this case a constitutionally-intolerable risk of an unwarranted or erroneous death sentence.

ARGUMENT

In California v. Ramos, 463 U.S. 992 (1983), the Court noted that many states prohibit capital sentencing juries from considering the availability of parole, pardon or commutation. 463 U.S. at 1013 n. 30. These state law rules developed in an era when release on parole was widely available for life-sentenced murderers, and the various states' prohibitions against instructions or jury argument concerning parole were designed to protect capital defendants from jury speculation concerning the likelihood of early parole release if the death penalty was not imposed.[10] In recent years, however, with the steady expansion of "life without parole" statutes,[11] parole for life-sentenced murderers has increasingly moved from a real possibility to a jury-room myth, unfounded in reality but ever-present in the deliberations of capital sentencing juries. And with this change, rules that once protected capital defendants from potentially harmful speculation now serve to increase the danger of death sentences based on jurors' misinformed fear of parole release. This case illustrates in stark form the unfairness that can result when the crucial fact of a defendant's

[10]See generally, W.E. Shipley, Annot., Prejudicial Effect of Statement or Instruction of Court as to Possibility of Parole or Pardon, 12 A.L.R.3d 832 (1967).

[11]See generally Wright, supra n.4, at 540-47 (describing and classifying various state life-with-parole statutory schemes).

lifelong parole ineligibility is withheld from the jury that must sentence him.

A. THE TRIAL COURT'S REFUSAL TO INFORM THE JURY OF PETITIONER'S PAROLE INELIGIBILITY, COUPLED WITH THE STATE'S EMPHASIS ON PETITIONER'S ALLEGED FUTURE DANGEROUSNESS, VIOLATED HIS DUE PROCESS RIGHT TO REBUT THE STATE'S CASE FOR THE DEATH PENALTY.

It would seem almost self-evident that the Eighth Amendment entitles a capital defendant to provide the sentencing jury with the most basic information concerning its non-capital alternative--namely, that state law will keep him in prison, and thereby protect society, if the jury spares his life. Yet the Court need not reach that issue in this case, and may choose not to do so, since the case can be decided on a narower ground. See, e.g., Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 827 n. 4 (1986); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501-02 (1985), and authorities cited therein. Because the prosecutor at petitioner's trial argued for a death sentence specifically on the ground of petitioner's future dangerousness, the denial to petitioner of the essential means to meet that argument by informing the jury truthfully that a life sentence would permanently end such future danger amounted to a denial of due process in the fundamental sense of "'a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690 (1986).

1. The trial court's refusal to inform the jury of petitioner's parole ineligibility violated the rule of Gardner v. Florida.

Neither the Pennsylvania nor Virginia courts appear to have explained in any detail the reasons for their unusual position. Therefore, it is not possible to discern whether any peculiarity of Pennsylvania or Virginia law may justify the refusal of those states to inform capital sentencing juries of capital defendants' permanent ineligibility for parole.[28]

In sum, petitioner's request that the jury be told that a life sentence means life without parole would have been granted in all but a handful of jurisdictions. Indeed, in at least 20 life without parole states petitioner's request would have been unnecessary, because the trial judge would have submitted verdict forms to the jury making clear that the life sentence alternative

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treatment of this issue before O'Dell, see William W. Hood, III, The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing, 75 Va. L. Rev. 1605 (1989).

[28]One factor that might help to explain the position taken by the Pennsylvania and Virginia courts is that, in contrast to South Carolina, both states provide for gubernatorial commutation of prison sentences. Pa. Const. art. 4, §9(a) ("In all criminal cases except impeachment, the Governor shall have power . . . to grant . . . commutation of sentences" subject to recommendation of Board of Pardons); Va. Const. art. V, § 12 ("The Governor shall have power to remit fines and penalties . . . [and] to grant reprieves and pardons after conviction . . . "). Because a sentencing verdict of "life imprisonment without possibility of parole" might be deemed misleading where state law provides for the possibility of gubernatorial commutation, see California v. Ramos, 463 U.S. at 1009, it is perhaps arguable that a state may exclude all mention of post-conviction release in jurisdictions where such commutation is possible. But as noted previously, South Carolina is one of only two death penalty states in which sentences of life-without-parole may not be modified by gubernatorial commutation. Ala. Const. Amend. XXXVIII § 124 (governor may commute only death sentences); S.C. Const. art. IV, § 14 (same); see Wright, supra n. 4, at 550 n. 141.

No. 96-6867

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

JOSEPH ROGER O'DELL, III

Petitioner

v.

J. D. NETHERLAND, WARDEN, et al.

Respondents

CERTIFICATE OF SERVICE

I certify that I am a member of the bar of this Court and that on December 12, 1996, I faxed and mailed, by United States Postal Service, a copy of the Respondents' Supplemental Brief in Opposition to Robert S. Smith, Paul, Weiss, Rifkind, Wharton & Garrison, 1285 Avenue of the Americas, New York, NY 10019-6064, counsel for the petitioner.

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No. 96-6867

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

J.D. NETHERLAND, Warden, Mecklenburg Correctional Center; RONALD J. ANGELONE, Director, Virginia Department of Corrections: JAMES S. GILMORE, III, Attorney General of the Commonwealth of Virginia; COMMONWEALTH OF VIRGINIA,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

JOINT APPENDIX
VOLUME I, PAGES 1-137

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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA,	)	RECORD
v.	)	11413
JOSEPH ROGER O'DELL,	)	

Defendant.

September 11, 1986

* * *

[10] THE COURT: That is water over the dam, Mr. O'Dell.

MR. O'DELL: All right. I just want to bring it up, Your Honor. I am asking for an instruction to the jury about the three convictions, meaning there is no parole for the defendant; and I also want to quote to the Court without argument about future dangerousness that is going to be presented, and I quote. I quote *Juricek v. Tex.* and *Barefoot v. Estelle*.

I also would ask the Court to instruct to the jury an explanation of what vile and wanton means in aggravated, *Smith v. Commonwealth*, 219 Va. 455.

Although this may be water over the dam, the victim's family was crying in front of the jury while the mannequin was displayed; and the defendant made a motion prior to this trial, a pretrial motion, to prohibit that type of stuff because of prejudicial effect it would have on the jury; and it has happened; and I want that on the record, Your Honor; and I would ask – I would ask the Court that beings that mannequin was so blatantly

displayed in front of the jury where the jury had to brush against it to come to and from the jury box to the outside of the court, I would ask

* * *

[16] MR. TEST: Thank you, Your Honor. May it please the Court, good morning, ladies and gentlemen.

We are now beginning the procedure which you were informed in voir dire is the second phase of a capital murder trial, the sentencing phase. I state to you now that during the presentation of the evidence in this phase the Commonwealth will prove to you beyond a reasonable doubt both of the approved sentencing procedures under which you may sentence this defendant to death in the electric chair.

Those two sentencing alternatives – either or both – first, that this case itself, the murder of Helen Schartner, was so outrageously or wantonly vile in that it involved aggravated battery to her person beyond the minimum necessary to commit the act of murder.

On that issue you already have all the necessary evidence presented. You have seen the photographs, and you have heard the testimony of Doctor Presswalla. She [17] died by strangulation, and you have seen the marks that were on her neck. That is the minimum act necessary

to have committed this murder. The aggravated battery involved each and every other wound.

The second alternative under which you may find that the defendant is deserving of the death penalty is that because of the prior past history involving both his criminal record and past accounts of violence, his continued life presents a continuing serious threat to members of society. The Commonwealth will prove beyond a reasonable doubt that alternative also.

Ladies and gentlemen, after considering all the evidence that is presented in the sentencing phase, both the aggravating circumstances and those mitigating circumstances as they may be presented, the Commonwealth will submit this issue to you confidently that within your collective judgment you will reach the just decision. Thank you.

Thank you, Your Honor.

THE COURT: Mr. O'Dell.

MR. O'DELL: Throughout the entirety of this case you have never heard my side of the story, and there's a reason; and you will hear my side before today is over. You didn't hear nothing about how that crime really happened. All you heard was lies. The [18] defendant is going to attempt today to show you the lies that were told in this case, to show you the cover-ups that was done by that man right there. I'm going to show you.

There was evidence kept from you that would have showed you beyond a shadow of a doubt that I didn't commit this crime. When I get on that stand today, I'm going to show you why I did not kill that woman.

He would have you to believe the defendant, because of his past record, committed this vile crime; but the defendant didn't do this crime; and I don't blame you people for bringing back that verdict – because I would have brought back the same verdict if I had been told all those lies that he told you.

Today I hope I can show you that – just how these people here have covered up this case and lied and showed you people how terrible this man here is. I admit – and I will show you on the stand today that I got a bad past record; but that don't mean I killed this lady. Because I didn't kill this lady, and I will show you on the stand today evidence from my own mouth – and I want you to think about it – that shows why didn't this man do certain things to show you that I didn't do it. No.

He covered it up. He brought you all [19] circumstantial evidence that was full of innuendos, bloodstained evidence.

He kept you from the fight. I want to show you about the fight, why the people that was in the fight with the defendant was never brought up here, why the defendant was held in jail twenty months, and why all his witnesses disappeared.

There is a whole lot of things you people haven't heard, and I think after today that you are going to wonder why. There is people out there in that audience wondering why this wasn't brought before us. Because they know the truth. And I would like for you people to know the truth.

I just wished I had it to do all over again because I would take that stand – and I will tell you people why I didn't take the stand. Because I got a past record that dates back to the time I was sixteen years old; and I was afraid if I took that stand, that because of my past record, that you would say, "Well, he did that crime."

Well, I took a chance and didn't get up there and present the evidence. It's too late now, so what I want to do, ladies and gentlemen, I want you to hear all his evidence. You are going to hear what a bad record I've got, and most of it will probably be the [20] truth. I'm ashamed of it. I'm ashamed of my past, but you will also see that I tried to keep myself straight. You will see where I tried to settle down.

They tried to tell you I lived out of a car. I don't know why they told you that. Because that's a lie. I didn't live out of my car.

Tried to say I was a night person. Maybe I was. I went out and enjoyed myself after I worked, but he didn't tell you I had a steady job working real good, making good money.

No, ladies and gentlemen, you was fooled. You was tricked, but I don't blame none of you – because I would have brought back the same verdict. I sit there and empathize. I said if I was on that jury, what would I do? I would have done the same thing you all done.

I would have done the exact same thing because you was fed lies after lies after lies, and I think after I get up there today and show you the lies, I think that you'll believe me. You'll believe me – because it's the truth.

I just wished I could bring the witnesses in now and I wished I had the witnesses that were hid from you all, the evidence that was hid from you people.

It's a travesty of justice because a person has [21] to defend himself because he is poor and can't afford an attorney. I was put in this position. I couldn't help it – because I don't have no family, but I had to defend myself, and I tried the best I could.

Now, I told you when I began this case that if you really believed that I killed this lady, to give me the death penalty – because I would deserve it and I still mean that. I am not going to get up here and try to fool you people, try to trick you people like he did into thinking that I am a good guy, that I deserve a life sentence.

I am not going to try to do that. Because if you still think that I deserve the death penalty, then invoke it. I ask you to do that, but I tell you right now I did not kill that lady.

I don't know who killed that lady. I know I never seen the lady before in my life, but circumstances – this man right here would have you to believe – would have led me to believe the way it was presented – that I did in fact do it.

I am not a murderer. I am not a killer. I might have been a thief in my childhood and coming up. I might have made a few mistakes, but I am not a killer, and I am definitely not a rapist – and sodomy turns me off. To me that is the most atrocious thing a [22] person can do – because that's against God. It wasn't meant to be that way.

You don't know how I felt letting you people hear this kind of mess. I was embarrassed. It was all I could do to constrain myself.

I know that you people has heard some gross things. That mannequin sitting in front of you all day long with that blood all over it where you had to walk by it and see these bloody clothes this lady was killed in and get – and you see my bloody clothes up there where I was supposed to have killed this lady.

Well, I ask you this. If what the Commonwealth said was true, how come the defendant was supposed to have carried the body? Why wasn't blood all over the front, all over the arms? How come there wasn't spatters where someone was hit in the head with a gun like he said?

How come there was no soil on the defendant's car from the field? How come there was no soil that he told you about on those pants that was mixed with the blood? If the soil samples had been taken, ladies and gentlemen, which they were and they was hid – I know he is going to object because he doesn't want you to know the truth.

Go ahead, Mr. Test.

[23] MR. TEST: These comments are improper for an opening statement in this phase of the trial.

THE COURT: Try to give you great latitude, Mr. O'Dell, but they are improper.

MR. O'DELL: Your Honor, I was not allowed to let these ladies and gentlemen know my forty-seven reasons why I couldn't have been guilty of this crime.

THE COURT: Mr. O'Dell, the guilt phase of the trial has been tried.

MR. O'DELL: I just want them to know. I will just say this. They hid the evidence from you. It's all over with now. This might be decided on appeal, but I ask you to listen real close. Listen and determine whether you think the truth was told to you or not.

Thank you.

THE COURT: Mr. Test.

MR. TEST: Your Honor, before calling my first witness, I would move to introduce certain documents into evidence.

Your Honor, I would ask that the next number – I believe it's 69, Your Honor. I believe it's Commonwealth's Exhibit Number 69, Your Honor, and I'd ask that they be marked respectively A, B, C, and D.

Commonwealth's Exhibit 69, Your Honor. A.

[24] (Document handed to Mr. Ray and Mr. O'Dell for examination.)

THE COURT: Mr. Test, it would be 70.

MR. RAY: 70.

MR. TEST: 70-A, Your Honor.

MR. O'DELL: Your Honor, I would object to them being introduced because they are not authenticated. However, I'll stipulate to the introduction if he will allow me to introduce these transcripts and so forth without any objection.

THE COURT: They are admissible in the form they are in.

MR. TEST: They are authenticated, Your Honor.

MR. RAY: The second page isn't, Your Honor. This is certainly the penalty phase. They should have the second page authenticated. We object to the admissibility of that.

THE COURT: Overruled.

MR. RAY: Exception, Your Honor.

MR. TEST: Commonwealth Exhibit 70-B, Your Honor.

THE COURT: Got any objections to B?

MR. O'DELL: Sir?

THE COURT: Objections to 70-B or not?

(Conference between Mr. O'Dell and Mr. Ray)

[25] MR. O'DELL: No, there is no objection, Your Honor.

THE COURT: Okay.

MR. TEST: 70-C, Your Honor.

THE COURT: Any objections to 70-C?

MR. RAY: Yes, sir. As I remember the authentication statute in Virginia –

THE COURT: I am talking about 70-C.

MR. RAY: Oh, no. Go ahead, Mr. O'Dell.

MR. O'DELL: No, I don't have no objection to it.

MR. TEST: 70-D, Your Honor.

THE COURT: Any objections?

MR. RAY: Mr. O'Dell?

MR. O'DELL: No, sir. The only thing, Your Honor, I still want to quote *Juricek v. Tex.* and *Barefoot v. Estelle* with reference to those being introduced.

THE COURT: They will be admitted. All will be admitted.

(Commonwealth's Exhibit Number 70-A through -D were marked in evidence by the Court.)

MR. TEST: Ladies and gentlemen, Your Honor, and for the record, I will simply state what Commonwealth Exhibits 70-A, B, C, and D are. Commonwealth Exhibit [26] 70-A is the certified conviction from the City of Norfolk, Virginia, on the 7th day of November, 1957, convicting the defendant, Joseph O'Dell, of one count of grand larceny.

Commonwealth Exhibit 70-B is the certified copy of the records of the court of Norfolk, Virginia, on the date Monday, September 25, 1961, convicting the defendant, Joseph O'Dell, of five counts of grand larceny and five counts of armed robbery.

MR. O'DELL: Objection, Your Honor. He has mischaracterized the charge. There were five charges on unauthorized use.

THE COURT: Let me see it.

MR. TEST: The charge reads grand larceny and unauthorized use of a motor vehicle.

MR. O'DELL: Objection, Your Honor.

THE COURT: The court order reads grand larceny, unauthorized use of a motor vehicle, and certain numbered documents, and for robbery on a certain number of indictments.

MR. O'DELL: Your Honor, I've got it right here.

THE COURT: And that is the extent of the description and nature of the crimes.

MR. O'DELL: Well, I have a copy here, Your Honor, and it's –

[27] THE COURT: Do you agree with that, Mr. O'Dell?

MR. O'DELL: No, sir, I don't. I have got my copies here. It's got the Corporation Court seal on it.

THE COURT: Yes, sir.

MR. O'DELL: And it's five charges unauthorized use of a motor vehicle, 1961.

THE COURT: Let me see what you have.

(Document handed to the Court for examination.)

THE COURT: Mr. O'Dell, you are missing – how are you missing the word "robbery" on the fourth line of the second paragraph?

MR. O'DELL: Your Honor, I had to dig these out of my archives. They are twenty-five years old.

THE COURT: Look at the fourth line in the second paragraph. The first word of the second line. Robbery.

MR. O'DELL: Second paragraph on this sheet here?

THE COURT: That's right.

MR. O'DELL: There is nothing wrong with that, Your Honor. I am objecting to the unauthorized use. You are taking [sic] about where it says robbery on two, four, six, eight, ten?

THE COURT: Let me see it again.

[28] MR. RAY: Your Honor, I think the central objection is that it is not grand larceny but it's –

MR. O'DELL: It's a lesser offense. It's unauthorized use of motor vehicles.

THE COURT: The indictment reads grand larceny, unauthorized use. The conviction reads whereupon is considered by the Court guilty of robbery of a certain number of indictments and guilty of unauthorized use of a motor vehicle. That's what the finding was. The finding was not grand larceny per se but unauthorized use.

MR. RAY: Yes, sir.

THE COURT: All right. Well, that's the same as in the order which has been submitted.

All right. You may proceed.

MR. TEST: Thank you, Your Honor.

Ladies and gentlemen, Commonwealth Exhibit 70-C, a certified copy of a court order from the County of

Goochland, State of Virginia, dated 11th of August, 1965, finding the defendant, Joseph O'Dell, guilty of the charge of second degree murder and fixing his punishment at twenty years.

Commonwealth Exhibit 70-D, a certified exemplified copy of proceedings before the Circuit Court of the Fourth Judicial Circuit in Florida, County [29] of Duval, finding the defendant, Joseph O'Dell, guilty, 5th of February, 1975 – I'm sorry – that's the date of the offense – in the fall term – I'm sorry.

MR. O'DELL: September 23rd.

MR. TEST: Dated September 23, 1975, finding the defendant guilty of one count of robbery and one count of abduction, fixing his sentence at ninety-nine years.

MR. O'DELL: Objection, Your Honor.

THE COURT: Yes, sir.

MR. O'DELL: Mischaracterizing the charge.

MR. TEST: Robbery and kidnapping, Your Honor. I'm sorry.

MR. O'DELL: Object again. It was not robbery and kidnapping.

THE COURT: Well –

MR. RAY: Sir, Mr. O'Dell has requested an out-of-court hearing.

THE COURT: After you hear what I have to say, then perhaps you won't find the problem. The charge was

that of – two indictments – two charges in the indictment. Did by force, violence, or assault, or by putting in fear feloniously rob, steal, and take away from the person or custody of a certain person, certain property of value, to-wit: Money, the property of Donna Doyle.

[30] Second count reads without lawful authority forcibly or secretly confine or imprison one certain party against her will, with the intent to cause her to be secretly confined or imprisoned against her will.

There are two indictments which are not characteristic of our system, which are called judgment and sentence, state prison, signed by the judge; and it refers to, one, the defendant having been found guilty of the crime of kidnapping.

MR. O'DELL: Your Honor, I'm going to object to all of this being read in front of the jury.

THE COURT: And the second one is that of robbery, again, signed by the judge.

MR. O'DELL: Your Honor, I asked for an out-of-court hearing, and I object to it being read in front of the jury because there is a mistake in the record, and I have reason to show you that there is a mistake in that record, but it's already been read in front of the jury so it doesn't make any difference.

THE COURT: There is an official document certified to –

MR. O'DELL: It is wrong. I have documentation to show it's wrong.

THE COURT: Ladies and gentlemen of the jury, – if you will step out for a moment.

* * *

[35] DONNA DOYLE, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TEST:

Q Would you state your name for the record and the ladies and gentlemen of this jury.

A My name is Donna Doyle.

Q Mrs. Doyle, could you be good enough to spell your last name for us?

A D-o-y-l-e.

Q Mrs. Doyle, where do you live?

A I live in Jacksonville, Florida.

Q Where did you live in 1975?

A In 1975 I lived on Bamberg Road, which is also in Jacksonville, Florida.

Q Mrs. Doyle, I want to direct your attention to a specific date and time in February, 1975, and ask you if in [36] the early part of the month of February, 1975, something unusual happened to you.

A Yes. On Wednesday, February 5th, I was working in the convenience store that my husband and I operate.

It was a Zippy Mart, and at 4:15 in the morning a man came in, pulled a gun, robbed my store, dragged me out, tried to rape me, beat me up.

MR. RAY: Objection, Your Honor.

THE COURT: Sustained.

MR. RAY: Sir?

THE COURT: I said sustained.

MR. TEST: On what grounds, Your Honor? She is relating what happened to her.

MR. RAY: Your Honor, he knows better than that. That is not in the charge. We request an out-of-court hearing as we did yesterday on this, Your Honor.

THE COURT: Members of the jury, step out.

(The jury was excluded from the courtroom, and the following took place out of the presence of the jury:)

MR. RAY: Your Honor, we respectfully ask as yesterday to preview this witness. You've got evidence in the record that's not charged, the crime of rape.

MR. TEST: That matters not, Your Honor, whether he's been charged or convicted of any prior crimes.

* * *

[40] Bring the jury in.

(The jury was recalled to the courtroom, and the following took place in the presence of the jury:)

THE COURT: Ladies and gentlemen of the jury, you are to disregard the comment by the witness concerning the characterization paraphrased as attempted rape. You are not to consider that expression.

Continue, Mr. Test.

MR. TEST: Thank you, Your Honor.

BY MR. TEST:

Q Mrs. Doyle, at the time this happened, were you alone in the store or was anyone else there?

A I was not alone. I had worked from four in the morning till eleven o'clock in the evening. Don, my husband, came in to relieve me since he normally worked the night shift. He was sick at the time. When I left the store, I went home and went to bed.

The phone rang. It was Don saying he was so sick, could I please come back in and take over the store? I got there I guess about 1:00 – maybe 1:30 in the morning. He was burning up with a fever.

We always kept a cot in the back storeroom. There are a lot of times when we try and catnap back there. [41] It was a twenty-four-hour operation. Sixteen, eighteen hours a day is not unusual. Don went back into the storeroom to lay down.

Q Besides the two of you, was anyone else in the store?

A Customers in and out occasionally; but at that hour of the morning, there just aren't that many people on the road.

Q Okay. Now, describe exactly what happened as the person came into the store, what was said and what was done.

A It was about 4:15, and Don had finally settled down and gone to sleep, and I sat down on some milk crates in back of the register, and I saw some headlights through the window, and I stood up and a customer was coming in, and a man came in, came up to the counter and asked for a pack of Winstons.

I reached down to pull the cigarettes out from the counter; and when I put them on the counter, he pulled out a gun and said, "Give me all your money."

One thing that is good about Zippy Mart – they train you what to do in case you are robbed, which that is give the person the money, don't argue. Just give it to them.

Money can be replaced, but a life can't, so I grabbed all the bills out of the register and I gave them to [42] him.

Q After you gave the person the money, what took place next?

A He hesitated for just a moment and said, "Let's go," and I said, "No," and he said again, "Let's go," and I was trying to angle back toward the other side of the counter to get away from him, and I said, "I'm not going," and said, "If you scare me anymore, I'm going to faint," and he had the gun on me and he said, "If you faint, you won't be getting up."

I kept thinking about Don back in the storeroom. We had two rifles back there – a rifle and a shotgun – and I thought if I could get back to the storeroom, I would be

okay. I started walking toward the other end of the counter back toward the storeroom.

Q As you walked back there, what did the person do?

A He kept the gun on me and he kept saying, "Come on. We're leaving. I don't have all day," and I kept saying, "I can't. Look, it's cold outside." It was wet. It was raining. I just said, "Let me get my jacket."

I walked around the end of the counter and started to go toward the storeroom door, and I could see Don laying on the cot, and he was still asleep.

Q After you saw him laying there, what did you do?

[43] A The man started walking toward the storeroom door, and all I could keep thinking about –

Q Mrs. Doyle, don't tell us what you thought. Just tell us what you did. As he approached you –

A As he approached me, I started walking toward him.

Q What happened as you walked toward him?

A He grabbed hold of me and said, "Let's go," and I pulled away, and I said, "I'm not going." I just kept saying, "I'm not going," and he told me he was – I was going with him, and if I didn't, he would shoot me; and if I didn't believe he would shoot me, I better think again; and I told him, "I believe you would kill me but I am still not going," at which point he fired the gun.

The next thing that happened was he grabbed me around the neck like this and dragged me out of the store. (Demonstrating)

As he opened up the car door and as he was trying to shove me inside the car, my leg got stuck between him and the car door; and the harder he would shove and push with the gun, I couldn't move. I was stuck. I kept telling him, "I'm stuck. I can't move"; and I guess finally he understood what I was saying and he backed up; and as I started to straighten up in the car, I saw Don, my husband, in the store; and he was going like this. (Demonstrating)

[44] Q Now, you are gesturing. The court reporter cannot type your gesture.

A I'm sorry.

Q What do you say he was doing?

A He was waving his arm. I interpreted that to mean get out of the other car door.

Q Which car door had you been pushed into?

A The driver's side.

Q So what did you do when you saw your husband? Where was he standing – your husband?

A He wasn't standing. The front window was basically clear, but there was like a painted partition that covered the lower portion of it. I could see Don over that partition, and I thought he was gesturing for me to get on the other side of the car and get out.

Q All right. What did you do?

A I tried to get over to the other side of the car and get out.

Q How did you try to do that?

A I scrambled to the other side and I tried to grab hold of the door lock and I tried to jangle it open first, and it was locked, and I tried to pull the door lock, and every time I would go to pull the door lock, I found out for the first time in my life about automatic door locks. They are controlled from the driver's side.

[45] The man had gotten in the car in back of me; and every time I would go to open the lock, he would lock it and he was jabbing me in the side with the gun and kept telling me – I was crying. He kept telling me that if I tried to get away, he was going to shoot me; and he slammed the car door and we took off.

He told me repeatedly that if I tried to escape, he could kill me. If I screamed, he'd kill me.

We backed out of the parking space and out of the driveway and onto Rogero Road and onto a road that was directly across from the store.

Q You said the name of a road. Can you spell that for us?

A R-o-g-e-r-o.

Q All right. Go ahead.

A I felt like this wasn't happening. Things like this don't happen to people. You read about them. You see it on TV but it doesn't happen to you; and the man started telling me if I don't stop crying, he was going to kill me. He kept saying, "I'm going to kill you."

I managed to bring myself under control somewhat; and all of a sudden I realized that when this was all over I would have no idea what this man looked like or the car that I was in. I didn't know where we were. All I had done since we had gotten into Jacksonville was worked, so we [46] didn't know any of the side streets, so I was sitting over on the passenger side, and I looked over at him and took a look and saw what he looked like, and then I – underneath the streetlights as we passed them, I started reading what the name of the car was on the dashboard one letter at a time, and it said Electra 225.

We didn't drive very long, and we pulled up in back of some buildings; and I said to the man, "Can I get out now?" I said, "I don't know where I am. There is nobody around. Can I please get out?" and he said, "Not until you let me fuck you," and I said, "No."

MR. O'DELL: Objection, Your Honor.

MR. TEST: This is her recollection, Your Honor. It's admissible testimony.

THE COURT: Mr. O'Dell, this is admissible.

MR. O'DELL: Well, I'm objecting because I've got the transcript here, and it didn't say anything like that in the transcript.

THE COURT: You will have an opportunity when the time comes.

MR. O'DELL: Just something to prejudice the jury.

BY MR. TEST:

Q Please continue, Mrs. Doyle.

[47] THE COURT: Overruled. Exception noted. Go ahead.

A Yes, sir. I'm not too clear on some of the things that happened in the car. I've tried for eleven years not to dwell on this.

MR. RAY: Objection, Your Honor.

BY MR. TEST:

Q Mrs. Doyle, understanding that, please tell us what you can remember.

A All right. All right. O'Dell, the man sitting over there, grabbed me and dragged me over to his side of the car; and I told him everything in the world. I told him I was pregnant. I told him I had a social disease. I figured maybe I could just talk to him and he would let me go, and it didn't do any good, and he had his arm around my shoulder holding me, and he put his hand on my breast, and I pushed his hand away, and he grabbed hold of me around the neck, and I guess he had the gun up on the dashboard, and he hit me in the head with the gun, and he hit me several times, and he kept hitting the top of the car with the gun. He just couldn't seem to get it up high enough to get enough force into it.

I'm not sure exactly what happened after that, but there was a lot of conversation going on. I kept talking, trying to keep myself under cont [48] ol. I felt if I could talk and I could get him to talk, maybe I'd come out of this all right.

He told me his name was Billy, and again he started trying to get physical. He pushed me on my back, and I managed to get my legs up, and he had the gun, and he started swinging at me again with the gun, and I got my legs up, and I started kicking him, and he didn't like that at all, and he kept yelling at me, "Stop kicking me, stop kicking me"; and I told him if he would stop hitting me with that gun, I'd stop kicking him.

We talked for a little while. I talked about anything. It started to rain. I would say, "Oh, gee, my dogs are getting wet."

A little while later he asked me if I knew what the word necrophilia was, and I said yes, and he told me that it didn't matter to him whether I was alive or dead but he was going to have sex with me, and wouldn't it be better if I were alive? And I remembered something my husband had brought home from Vietnam, and I told O'Dell that the Geneva Convention allows warfare but it doesn't allow cannibalism. They can kill you but they can't eat you.

Q Is that something you told the defendant?

A Yes, it is, and once you were dead, what difference does it make anyway?

[49] Q All right.

A We were sitting in the car again, and once again he started trying to get physical, and he started to choke me, and he put his hands around my neck, and he started squeezing, and I kept trying to push him away, and I couldn't reach him to push him away, and finally he stopped, and we talked some more. Kept saying that he

was going to have sex with me and as soon as it was over, he would let me go. When I kept saying no, he grabbed hold of my neck again and I couldn't breathe, and he wouldn't stop squeezing.

I could feel my tongue coming out of my mouth, and finally I guess I shook my head and said yes, I would do it; and he backed off and I started to unbutton my blouse; and I couldn't do it. I just couldn't undress. I couldn't do it. And please understand that I had – I knew that when he was done with me, he was going to kill me; and I stood there and I said, "I'm sorry. I can't do this"; and he pulled the gun out again and he put the gun to my head and he cocked the trigger, and I had had it.

I just wanted this over with, and I said, "Well then, pull the damned trigger and let's get this shit over with"; and I started to say the Lord's Prayer out loud, and he told me to shut up and hit me in the back of the head with the gun and moved back over to his side of the car.

A little while later we were sitting there and I [50] was noticing the police cars. I could see police cars a couple of blocks over. It's a long block, and there is nothing out there. You can just see from one block to the other.

I knew Donal had been in the store and I knew as soon as I had been taken he would call the Police; and I figured if I could just keep on talking, sooner or later the police would spot us; and O'Dell had said to me that it didn't matter if the police spotted us or not, that he had nothing to lose.

He had already been in jail once, that if the police spotted us, he would kill me; and even though ultimately the police would kill him, he would take as many police officers with him as he could; and he kept seeing those police cars and it seemed like I was in there for hours. I kept waiting for the sun to come up.

A little while later somebody rode by the front of the car on a bicycle and O'Dell grabbed the gun and put it to my head and told me not to scream and not to say anything. When the guy on the bicycle rode by, O'Dell put the gun down, and I said, "Look, I'm not trying to hurt you. Just let me go." I said, "There is nobody here. I can't get to a telephone. Just let me go"; and he said, "Well, it doesn't make any difference. Nobody knows you are gone anyway"; and I said, "I don't think that you know that my husband was in the [51] store; and if you were smart, you see the police cars out there? They are looking for you"; and he pulled the gun out again and said, "Are you lying to me?" and I said, "No. As God is my witness, it's the truth; and if you were smart, you wouldn't be sitting here right now. You would be getting away."

He backed the car up and pulled out from behind these buildings, and it's a section of Jacksonville where there is little stores, little warehouse, a few houses here and there; and there is one big road that crosses it and a lot of little ones in back.

He crossed the big road, which is Arlington Road, and went on another side street; and after we were driving down this side street, a police car came this way in the opposite direction; and O'Dell hit the accelerator. We

went through back streets, side streets, we jumped curbs, we drove through people's yards. With every curb we hit, I would hit the dashboard or the ceiling. We crossed Arlington Road again and ended up on another side street by a school.

Again there was nothing there except for the school and some woods, and he stopped the car and told me to get out, and I remember what he had told me, that if the police got after him, he was going to shoot me first; so as soon as I got out of the car, I threw myself on the ground; and he took off in the car; and I don't know why and I don't [52] know how; but I looked up and I got the license plate number; and I started chanting it to myself.

Just before O'Dell had told me to get out of the car, he had told me I was to stand there for ten minutes. He would circle the block and come back; and if I was still standing there, he would drive by and let me alone; but if I wasn't standing there, he would find me and he would get me.

I didn't know where I was. I had no idea. I started walking in the opposite direction on the road, and I saw a set of headlights coming around the corner. I didn't know if it was the police department, if it was O'Dell coming back, who it was.

I flagged the car down, and it turned out it was a man delivering newspapers, and I told him that I had been kidnapped and I needed to get to a phone, and I asked him for a piece of paper and a pencil so I could write down the license plate number because I was still chanting it.

He didn't have a pencil, but he did take me to the closest pay phone. Since I didn't have change, he gave me the money that was required in order to use the pay phone; and I called the store and Don answered; and I told him that I was okay, and this is the license plate number.

Q After that phone call, did there come a time when you saw a police car?

[53] A Yes.

Q What happened then?

A Almost immediately, just as I was hanging up the phone, I spotted a police car; and I went running out of the phone booth flagging him down; and I told him who I was; and he had heard the call and he said, "Get in the car."

I got in the car and I believe his name was Officer Jones, and we started to drive, and he asked me if I had been raped, and I said no, and he said did I need to go to the hospital? I said, "No. I'm okay."

I thought he was going to take me back to the store, but we weren't headed toward the store, and I said, "Well, aren't you going to take me back to Zippy Mart?"

"No. We believe we have caught the man and you need to identify him."

We drove over the Mathews Bridge, which is one of the roads that comes into Arlington, and then took the Haines Street exit and drove for a little while on Haines Street, and I saw all these lights – blue lights, red lights,

whatever – I don't recall, but obviously something had happened.

We pulled up and I – all of a sudden I realized these were all police cars, and the officer told me to sit there for a minute. A little while later another officer came over, an older man; and he told me I needed to get out of [54] the car because I had to identify the man that they had picked up; and I told him no, I wasn't getting out of that police car.

I said I was scared, and he told me that I had nothing to worry about, that there were plenty of other officers there. I got out of the car; and, yes, there were a lot of police officers there; and they had a man, Mr. O'Dell, draped like this with his hands over his head over the roof of a car, and the officer asked me, "Is this the man?" and I said, "I can't tell." I said, "I can't see him."

So the officer brought me closer, and he had the other officer make the man stand up; and that was him, Mr. O'Dell; and the officer asked me –

Q Mrs. Doyle, don't tell us what the officer asked you. That is not necessary.

A All right.

Q Mrs. Doyle, do you see the person in the courtroom that did these things to you eleven years ago?

A Yes, sir, I do.

Q Is there any doubt in your mind?

A None whatsoever.

Q Who is that person?

A That man right there. (Indicating)

MR. TEST: Your Honor, the record should reflect she indicated the defendant.

* * *

[61] Q Did you ever work for Judge Olliff?

A I'm sorry. I didn't hear.

Q Did you ever work for Judge Hudson Olliff?

A No.

Q Did you ever write any letters?

A Yes, I certainly did.

Q Would you tell us who you wrote the letters to.

A I wrote the letter to – I forget the people's name – the interstate compact which I think is called Probation and Parole in Florida.

Q Who else did you write?

A I sent copies of that same letter to – the letter was in 1983. I sent copies of the letter to the prosecuting attorney in the case, who has since gone into private practice, the investigating detective, the presiding judge, who was Hudson Olliff, and the governor of the State of Florida.

Q What was the reason for the letters?

A I had been contacted by Florida Probation and Parole asking what my feelings would be for Mr. O'Dell's parole to be transferred back from Virginia to Florida. I didn't even know he was out of jail. He'd been sentenced

to ninety-nine years, and suddenly in 1983 I find out he is loose again.

No, I didn't want you back in Florida. I have a [62] family.

Q Isn't it a fact that the defendant was sentenced to ninety-nine years, and he wasn't ever supposed to get out again? Isn't that correct?

A That's what I was told.

Q Okay. Isn't it a fact that the Florida Probation and Parole brought the defendant's release date from 2024 to 1982 because they found out you was lying? Isn't that a fact?

A Baloney.

Q Baloney. Well, can you explain, Mrs. Doyle, why the Florida Parole and Probation Commission reduced the charges – reduced the charges and released the defendant in 1982?

A I can't tell you about the workings of the Florida Probation and Parole Commission, but any reduction in charges is news to me.

Q What was the defendant charged with? Tell this jury what the defendant was charged with.

A Kidnapping, armed robbery, and I'm not sure how long the charges were held for attempted sexual battery.

Q Would it surprise you, Mrs. Doyle, that the defendant wasn't charged with armed robbery and wasn't

charged with kidnapping? That they would have been reduced to false imprisonment and robbery, not by gun?

[63] A That is news to me.

Q Well, that happens to be a fact.

MR. TEST: Objection, Your Honor, to him testifying.

THE COURT: Sustained.

BY MR. O'DELL:

Q Now, isn't it a fact that you wrote these letters? I know that you have got to explain to this jury that you are afraid of the defendant because I know you are, because you wrote letters that you were afraid. But isn't it a fact that the reason you're afraid of the defendant is because you lied, because you made up the story to cover the losses in your store that you and Donal, your husband, was stealing?

A I think the courtroom knows which one of us is lying.

Q You think so?

A I do, sir.

MR. RAY: Your Honor –

BY MR. O'DELL:

Q Because I am up here charged with capital murder?

THE COURT: Don't argue with the witness; and [64] please respond to the question, Mrs. Doyle.

THE WITNESS: Would you restate the question, please.

BY MR. O'DELL:

Q Isn't it a fact that you are scared of the defendant? You didn't want him out because you was afraid the defendant was going to get some retribution for you lying to cover up for your losses, the stealings that you and Donal, your husband, did at the store?

A Mr. O'Dell, Yes, I am afraid of the person that you keep referring to as the defendant because eleven years ago I sat in your car and I knew when you were done with me, you would kill me. I knew that then. I know that now, and I will have that knowledge with me till the day I die.

Q If the defendant – Was there a gun found in the defendant's car?

A I don't believe so.

Q Okay.

A However, I do remember the gun quite clearly.

Q Can you explain – can you explain – you say the defendant tried to rape you. I understood you said that awhile ago.

A That's correct.

* * *

[80] THE COURT: Fine. Why don't we just go to lunch now. It makes no difference. Then we can –

MR. RAY: Glad to.

THE COURT: Then you can decide how you will present your evidence.

All right. Bring out the jury.

(The jury was recalled to the courtroom, and the following took place in the presence of the jury:)

THE COURT: Mr. Test.

MR. TEST: Your Honor, the Commonwealth rests its case in sentencing at this point.

THE COURT: Ladies and gentlemen, we will recess for lunch until five minutes after one. We will proceed with the defense evidence at that time.

Everyone remain seated until the jury clears the courtroom.

(The jury left the courtroom.)

THE COURT: Let me ask the Commonwealth and the defendant one question. I read the Stamper case with respect to probation and parole and the position of the court at that time. I believe it took place prior to the bifurcated effect that we are now dealing with; and, of course, we don't know what the Supreme Court would do now that we have a bifurcated trial.

Is it the Commonwealth's position that it would [81] oppose an instruction that would read something to the effect that under present Virginia law the defendant, due to his criminal record, would be ineligible for parole if sentenced to a life sentence?

MR. TEST: Yes, Your Honor, the Commonwealth would adamantly object to that.

THE COURT: Again, present Virginia law. Because the law could be changed?

MR. TEST: Yes, Your Honor. The reason I'm objecting isn't specifically because of the Stamper case but because there is an instruction which has been approved in Stamper and other cases which states the jury is not to consider what may happen after their deliberation.

THE COURT: That's true.

MR. TEST: So based on that – and I'll be glad to read through the cases again and tell the Court my thoughts on it again after lunch; but as you know, I still oppose it.

THE COURT: Yeah. I believe it is after the change in the law. I am just not sure what the Court would do with it.

MR. O'DELL: We would, of course, ask that it be given, Your Honor.

THE COURT: I understand that. We will discuss [82] it before we start again.

MR. RAY: Yes, sir.

MR. O'DELL: Yes, sir.

THE COURT: All right. Court stands in recess.

THE BAILIFF: All rise, please.

(The trial recessed at 12:08 p.m. At 1:17 p.m. the trial continued as follows out of the presence of the jury:)

THE BAILIFF: Order in the court. Remain seated, please.

MR. RAY: Your Honor, we – Mr. Collins and I – discussed with Mr. O'Dell the presence of those witnesses that he gave us this morning; and he has informed us that he waives their presence; and, second, I asked him if he would like me to return to my home and get the Florida prison records that I have; and he – he waived that; and if I misunderstood Mr. O'Dell, he should set it on the record.

MR. O'DELL: Your Honor, in reference to the witnesses, they are having problems locating them, et cetera; and they are not that important at this point.

Insofar as the record goes for Mr. Ray having to return to his home, I felt like that at this point it wasn't really that important either. In view of everything else in this case, that would be a minute [83] point.

However, the Commonwealth was in error on those charges – on the Florida case and the Virginia case.

THE COURT: Now is the time to correct it, Mr. O'Dell.

(Pause)

MR. O'DELL: Well, Your Honor, I would like to reserve that point, and I will get certified copies from Duval County and from Norfolk.

THE COURT: How are you going to reserve the point?

MR. O'DELL: Well, evidently I can't get certified copies now. Mr. Ray has copies now at his home, but they are not certified. They are copies of my prison record in Florida.

THE COURT: Who knows? I might let them in for what they are worth.

MR. RAY: I will be glad to go home, but it takes me between twenty-five and thirty minutes one way.

THE COURT: I'm aware of the problem.

MR. RAY: I will be glad to, Your Honor. Whatever Mr. O'Dell wants to do.

THE COURT: Can Mr. Collins locate them?

MR. RAY: No, sir. I have got three dogs, and I [84] don't think Mr. Collins would make it out there.

MR. O'DELL: Well, Your Honor, I am going to just go ahead and waive that point.

THE COURT: You are going to waive it anyway?

MR. O'DELL: I am going to waive it.

MR. RAY: Be sure.

MR. O'DELL: I will waive it.

THE COURT: All right.

MR. O'DELL: Because I don't think it – I don't think it would prejudice the jury more than what they are already prejudiced.

THE COURT: Mr. O'Dell, I don't know whether you are going to take the stand or not; but assuming you do, I have allowed you to remain in the courtroom without any restraints; and the deputy will be standing in the jury doorway while you are in the witness box.

MR. O'DELL: Okay. I don't have no problem with that.

THE COURT: All right. Anything else?

MR. TEST: Your Honor, I just would like to bring this point up now. I have reread Stamper over lunch and the companion case which is referred to in Stamper, and that is *Hinton v. Commonwealth*, 219 Va. 492, and on the point in Stamper regarding whether the Court may properly or not properly inform the jury [85] regarding eligibility for parole or probation, the Stamper case revolved around the case where the jury came back after an hour, hour and half, and had a question, and the Court stated that the proper response – the Supreme Court said the proper response of the trial court is to inform the jury that whatever may happen after sentencing is not their concern; they are to fix punishment as they see fit.

The Stamper case referred to the Hinton case, and if the Court has not read it, I think it may be important for the Court to do so before it rules. In the Hinton case the set of facts were somewhat similar. It was a case of malicious wounding, and the jury was out and came back with a question on the same issue and the Court instructed them that it could not really tell them anything other than – because it was restricted by the rules of the Supreme Court on the subject and it cited a long line of cases, but then the Court proceeded to tell them that there was an administrative arm of the government that controlled probation and parole and it was separate and apart from the courts and not for them to consider; but it mentioned words parole, good behavior, eligibility, some

people don't serve all their sentences, that variety of things.

It goes on a page and a half; and as I was [86] reading it, I thought possibly the Court could say something along those lines to the jury if the question came up; but then it hit me like a bolt of thunder that it was a complete reversal in the case because it was entirely prejudicial to the defendant.

The scenario was the jury came out and asked the question. When the judge had gone into the possibilities, the jury returned – deliberated and came back with the maximum punishment, and apparently the Supreme Court felt that the Court's overall questioning may have influenced that jury to think there was the possibility of parole and therefore changed that individual juror's mind to the maximum punishment, so I think we are somewhat bound by the long line of cases, Hinton and Stamper, that say the Court is precisely to say only the instruction that if they find the accused guilty, they must impose such punishment within the limits fixed by law as appear to be just and proper and that what might happen afterwards is of no concern.

I bring that up on the issue not only of probation and parole but also regarding the Virginia code section that now refers to third-time offenders of violent crimes – murder, rape, and robbery – are not eligible for parole.

[87] We are basically faced with the same situation; and although that issue has not been addressed in these cases, it is again an administrative function of the parole board to invoke that section and turn down a defendant's request for parole; and I think we would be faced with

the same situation if the defendant asked for an instruction such as that.

The final point that may come up in this that I can possibly envision is that the defendant either in testimony or in argument makes some reference to it. If he does such, I will simply ask – I will object to it on the record and ask that the jury be instructed to disregard it.

THE COURT: All right.

MR. RAY: Well, Your Honor, we are willing to risk whatever the Supreme Court of Virginia might say as far as the instruction that this particular defendant faces life without parole. After all, the reason you are faced with the issue is that Mr. Test has introduced fourteen felonies against this particular defendant.

I think the statute is applicable. I think he does face life without parole. I don't think there is any question that's what it means, and for the jury to be fully informed of what the alternatives are, they [88] should be informed that it is in fact life without parole; and that's our basic premise; and Mr. O'Dell agrees with this; and I think the cases are applicable that the Court should be fully informed, that it doesn't mean life or it doesn't mean eleven years.

It means life without parole; and we intend to address it on examination if Mr. O'Dell decides to take the stand; and we respectfully ask the Court to inform the jury, as they should be informed, of this problem.

(Pause)

THE COURT: The instruction will be denied based on the present law and any precedent, and your exception is noted.

All right. Everybody ready to proceed?

MR. RAY: Yes, sir.

THE COURT: Bring out the jury.

(The jury was recalled to the courtroom, and the following took place in the presence of the jury:)

MR. RAY: Anita Fridley.

THE CLERK: Ma'am, can you raise your right hand, please?

(Mrs. Fridley was sworn.)

* * *

[107] *JOSEPH ROGER O'DELL III*, the defendant, called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RAY:

Q Would you state your name for the record, sir.

A Joseph Roger O'Dell III.

Q And it is your decision, your own decision, to take the stand and testify under sworn testimony and to waive all your rights, privileges, under the Constitution of the United States?

A Yes, sir. That's correct.

Q All right, sir. Sir, where were you born?

A Roanoke, Virginia.

Q And your mother – What was her name?

A Ellen.

Q Is she living now, sir?

A No, sir. She died July last year.

Q She died while you were in prison?

A While I was in jail.

Q In jail. And your father, sir – What was his name?

A Joseph Roger O'Dell, Jr.

[108] Q And when your mother died, were your father and mother married?

A No, sir. They were divorced.

Q And how old were you when they were divorced?

A I was sixteen years old.

Q Sixteen years old. And what was the occupation of your father?

A My father was in the Navy.

Q And did he eventually retire from the Navy?

A After thirty-four years. Yes, sir.

Q All right. And – and in the Tidewater area, sir, where have you lived?

A I have lived in Norfolk.

Q All right, sir. And how far have you gone in school?

A I finished high school, and I have got college equivalency, four years.

Q All right. And how old were you when you went into prison, sir?

A I was sixteen years old.

Q Sixteen. And what prison did you go into?

A Virginia State Penitentiary.

Q Where is that, sir?

A Richmond, Virginia.

Q And were you segregated from the adult [109] population or were you put in with the adults?

A I was put in with the adults.

Q All right, sir. And this GED, sir – where was that? In prison or on the outside?

A In prison.

Q All right, sir. And how many years have you spent in prison, sir, out of your adult life?

A Twenty-two years.

Q Now, the first two offenses, sir, that were talked about were – the first one was grand larceny, sir.

A That's correct.

Q What year was that? 1950?

A 1957. Got convicted in 1958.

Q And what grade were you in high school?

A I was in the tenth grade at Granby High School.

Q Granby High School. And how long did you stay in prison from that first offense, sir?

A Stayed in prison for three years, and I tried to run one time. My father beat my mother, and I got shot in the head.

Q Do you have those scars today?

A I got the bullet wound in my head. Yes, sir.

Q All right, sir. And the second offense is unauthorized use, motor vehicle, and I believe armed robbery?

A Yes, sir. That happened in 1961. I was [110] nineteen.

Q Nineteen. And you were let out of prison after how many years the first time?

A After twelve years and seven months.

Q All right, sir. Now, You have got a conviction for Murder 2 –

A Yes, sir.

Q – which you were sentenced to twenty years in Goochland County I believe in 1965?

A Yes, sir. That's correct.

Q Now, did that – did that murder happen when you were in civilian life or did that murder happen in prison?

A It happened in prison after I was attacked by a homosexual.

Q All right, sir. And, sir, did you practice homosexuality in prison?

A No, sir, I didn't.

Q And why would a homosexual attack you, sir?

A Because I was young boy.

Q How old were you?

A I was twenty-three at the time.

Q And where was this, sir?

A This was at Virginia State Farm, Goochland County. This man's name was Lloyd Best, and he was a known homosexual, and he also attacked young boys in prison. He was [111] well known. The man attacked me with a knife. I disarmed the man. I walked away from the man, and the guards at the prison testified to this – that the man pulled another knife on me, and I hit him with a chair and disarmed him again.

He pulled another knife out, the third knife; and at that time I stabbed him with his own knife. He lived for nineteen days, and he died from the pneumonia. He didn't die from the stab wounds, but I was convicted.

Q But you did stab him, didn't you?

A Yes, sir, I stabbed him.

Q And as a result of the stabs and the pneumonia, he died?

A He died nineteen days later.

Q And you were charged and you were convicted, weren't you?

A I was charged with second degree murder.

Q All right, sir. When were you released from prison, sir, under that?

A I was released January the 22nd, 1974.

Q 1974, sir. And where did you go from there?

A I went to Jacksonville, Florida.

Q Why did you go to Jacksonville, Florida?

A That's where my mother and father or stepfather resided.

Q All right, sir. And were you employed in [112] Jacksonville?

A Yes, sir. I was employed with Montgomery Industries International.

Q What kind of work was that?

A Well, I was in charge of the whole machine shop where we manufactured blow hogs, and I had to supervise the blueprints and make sure that all the setups were correct, and I checked quality control, and I fixed the computer sheets because everything was computerized.

Q Sir, when you been on – in civilian life, have you ever been unemployed? Have you always had a job?

A Always had a job. Momentarily I been unemployed but not for the most part.

Q When you were in Norfolk living with Connie Craig, did you have employment prior to the arrest on the charges of the murder of Helen Schartner?

A Yes, sir, I was working at the time.

Q And where were you working?

A I was working at General Foam and Plastics as a machinist and a bowl maker.

Q All right, sir. And what were you paid a week?

A It varied. Most of the time I made $500 a week. Sometimes I made $600, and at times I made as high as $800 a week.

Q All right, sir. Now, sir, have you ever been [113] married?

A Yes, sir. I have.

Q And are you married now?

A Yes, sir.

Q And who are you married to?

A My wife's name is Kathleen O'Dell.

Q All right. And where does she live?

A In Rhinebeck, New York.

Q All right, sir. And do you have any children of that marriage?

A I have one boy four years old.

Q And what is his name?

A His name is Paul – Paul O'Dell.

Q And does he have any medical problems?

A He has leukemia.

Q All right, sir. Now, you were sentenced to ninety-nine years –

A Yes, sir.

Q – for the armed robbery and kidnapping of Mrs. Doyle, sir?

A That's correct.

Q And how long did you stay in prison?

A I stayed in prison seven years.

Q Seven years. And is that because the system doesn't work or because you in fact had ninety-nine years or [114] why did they let you out early, sir?

A In Florida a ninety-nine-year sentence tells the parole board that they do not want you out. You have to do thirty-three and a third years to make parole. I was released after seven years because Donna Doyle – they found out Donna Doyle and her husband had lied. They dropped my release date from 2024 to 1982, and I was released August the 3rd, 1982.

Q All right, sir. Now, did you ever work for any law enforcement agencies?

A Yes, sir. I did.

Q And when was that, sir?

A In 1981, 1982.

Q And where was that?

A In Florida.

Q And what was the purpose of that, sir?

A Well, I was working for the Ranger Division at one time, the Florida Rangers. I wasn't a law enforcement Ranger because of my record. I was a park ranger with the Rangers, and my job was I patrolled the perimeters of the reservation and took care of the college campus, and I made sure there was no poachers on the alligators.

Q And this was after you were released?

A During my incarceration also.

Q All right, sir. Have you ever worked for any other law enforcement agency?

[115] A Not officially. I worked with the Florida parks law enforcement. I worked with Ronnie Cornelius, Jerry Peters, and Dalton Bray in drugs, drug implementation from Cuba and various other places.

Q Sir, why didn't you testify in your case in chief?

A The reason I didn't testify is because if I would have took the stand during my trial, I would have had to reveal to the jury that I had a past record, and my record was so bad, had I told – gotten on the stand and told you all what had happened, that I – that just by my record alone, I would have been found guilty, and that's the reason.

Q Now, sir, how old were you in 1983, 1984?

A In 1983 I was forty-one.

Q Forty-one years old?

A Yes, sir.

Q Why – Why did you ever go to live with Connie Craig, who was sixty-three or sixty-four then?

A I was forced to live with Connie Craig by the parole board.

Q When you mean forced – I don't know. From my perspective, it's pretty hard to be forced to live with a woman. Why – What were the circumstances of that?

A My wife – my wife and baby – my baby was seven months old in 1982, and I had to come back to Virginia to get [116] a parole violation that had happened in 1975 resolved, and my wife and baby were living in Lake City, Florida; and she was on welfare because of me being sent back to Virginia.

Q Yes, sir.

A And during the time while I was gone, a friend of mine – so-called friend of mine had told my wife that they had put me back in prison and that I was never going to get out, so my wife left and went off with him.

Well, my sister worked for the Navy, and through her computer she found out that my wife and baby were living in a place called East Palatka, Florida; so I asked the parole board if I could take a flight to Florida to see my wife and baby.

Q Virginia parole board?

A Yes, sir. And the Virginia parole board told me if I went to my wife and baby, that they would revoke my parole, so my sister and I flew to Jacksonville, Florida; and my mother bought me a car. She gave me a car, and my sister took the car and went to East Palatka, Florida; and she found my baby and my wife living in a shack; and my wife give her all my personal belongings and clothes and so forth and she couldn't believe, you know, that she had been lied to, you know, about me not getting out.

She said is Joe really in Jacksonville? And my sister said yes, so the parole board sent me back to Virginia . . .

* * *

[133] A I did on March the 21st, 1985.

Q Did he need a search warrant for that?

A He needed one but he didn't have one. I gave it to him voluntarily.

Q You consented?

A Yes.

Q Now, you have been convicted of a number of felonies, and if – if you are sentenced to life, does that mean life with parole?

MR. TEST: Objection, Your Honor. We been over this ground. Mr. Ray knows perfectly well it's not an appropriate discussion.

MR. RAY: We haven't discussed that, Your Honor and I think it's perfectly proper. We just discussed instructions.

MR. TEST: Your Honor, the ruling applies to testimony and Mr. Ray knows that very well.

A Well, I will tell you something.

THE COURT: I will sustain the objection.

A I'm not worried about that, Mr. Ray. I just want – look, whatever they bring back is okay. I just want the truth to be known about why I didn't testify and what happened that night. Okay.

[134] BY MR. RAY:

Q Now, you –

A Let me finish explaining some things to the jury, Mr. Ray.

Q All right, sir.

A Now, Connie Craig says that I said that I vomited the blood on my clothes. That was one time she told the truth. That is one time she told the truth, and I also told the police that – that I had vomited blood on my clothes, and I told the police why I said that I vomited on my clothes. Because of Connie Craig telling my parole officer, Jack Pollard, that I had been fighting at Ocean View. I had been given a direct order by the parole board that I was not to go to Ocean View for anything; and if she had told the parole board about that, I would be in jail and sent back to prison to serve sixteen more years; so rather than to go to prison for sixteen more years, I told a lie. I said I vomited blood on my clothes.

Q Sir, because of this conviction, how many – how many years do you have pending that you owe the state?

A Without this conviction, I got to do sixteen flat years before I will ever get out. That's because I got a Parole violation.

Q Even without this conviction?

A Even without this conviction. It's just like [135] this –

Q How old – How old are you now?

A I am forty-five – will be forty-five on September 20th. It's just like having a life sentence to go back to prison. I got sixteen years. I do fifteen on a life sentence. Okay. If I went back to prison without this conviction, I am doing a life sentence. I am doing a life sentence. I am never going to get out. It don't make no difference. I am never going to get out.

MR. TEST: Judge, I am going to object and ask that the remarks be stricken from the record and the jury asked to disregard those with regard to the Virginia prison system and parole and so forth.

THE WITNESS: I haven't said anything about parole.

THE COURT: I don't think he said anything about it, Mr. Test.

BY MR. RAY:

Q All right, sir. Sir, we – let me ask you about – what was your life like with your father? Would you care to tell the Court?

A Well, I am not going to try to make any excuses about being an abused child or to gain sympathy, but I was treated very bad.

[136] Q Did you deserve it or –

A Well, I guess I was like most little boys. I was always in trouble, you know. I do mischievous things like any other boy.

Q When you were administered corporal punishment, how did he do it?

A In various ways. He would beat me in the head or kick me. Sometimes he was good to me. Just various ways.

Q Do you still love your father, sir?

A Oh, yeah.

Q Is there anything else you would like to tell them?

A Well, I just want the jury to know this. I am saying I am not guilty; and I know you have already found me guilty; and as I said previously, I would have found myself guilty had I not – if I had been on that jury, I would have found me guilty too with what you people knew and what they hid from you. I would have done the same thing, and I want you to know that I think you are still a good jury, that you brought back a verdict that nobody else would have brought back any different with the evidence that was put before you; but you was lied to; and I hope I get a chance today to show you some more things that I can't say from the stand that was hid from you also.

* * *

[172] (The jury was recalled to the courtroom, and the following took place in the presence of the jury:)

THE COURT: Ladies and gentlemen, listen to the instructions that are appropriate and closing arguments from the Commonwealth and the defense in the sentencing phase. I will read the instructions to you at this time.

Instruction Number 1. You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed of death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives.

Number 1. That after consideration of his history and background there is a probability that he [173] would commit criminal acts of violence that would constitute a continuing serious threat to society; or, Number 2, that his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman in that it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death; or if you believe from all of the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment in the penitentiary.

If the Commonwealth has failed to prove beyond a reasonable doubt either alternative, then you shall fix the punishment of the defendant at life imprisonment.

Instruction Number 2. The Court instructs the jury that aggravated battery means a battery that qualitatively and quantitatively is more culpable than the minimum necessary to accomplish an act of murder.

Instruction Number 3. The Court instructs the jury that in reaching your decision on the question of punishment, you are to weigh the evidence in aggravation and mitigation, but you are cautioned that [174] you are not to be influenced by any passion, prejudice, or any other arbitrary factor.

Instruction Number 4. The Court instructs the jury that you need not find any mitigating circumstances in order to return a sentence of life imprisonment. Although you may find one or more aggravating circumstances and no mitigating circumstances, you as a jury still always have the right to exercise mercy and sentence the defendant to life in prison.

Mr. Test.

MR. TEST: May it please the Court, ladies and gentlemen of the jury, again I thank you for your patience and for your attentiveness.

We all knew a month ago that it was possible we would reach this point; so now when I speak to you, I speak to you collectively as though you are one person because what we ask now is that again you react, think, talk, and work collectively for one decision. I do not mean to indicate to you that you are not in fact twelve

separate individual minds, for you are; but you are the collective conscience today of this community; and as such, you must act as a collective reasoning conscience.

I further speak to you on behalf of the office [175] of the Commonwealth's Attorney in this city because it is that office that is the duly appointed representative to represent the citizens of this community in a case such as this; and, ladies and gentlemen, I ask you to do something today that is totally against the grain of someone who is a living, breathing human being.

I ask that you sentence this man to death. It is not something that I do lightly, and it is certainly not something that I expect you would think of or take lightly.

If I may have the instructions, Your Honor.

Thank you. This is the only one I need, Your Honor.

The instruction that the Court just now read to you details what the law is for a sentencing hearing such as this. It tells you that the Commonwealth in a sentencing hearing still must prove to you the same legal standard beyond a reasonable doubt, one of two possible things; and I submit to you ladies and gentlemen right now we have proved beyond any doubt both of them.

The first one is the issue of whether or not this crime as it was committed was so horrible, inhuman, outrageously wanton or vile such as it [176] involved an aggravated battery to this victim, Helen Schartner, beyond the minimum necessary to accomplish the act of murder.

Aggravated battery is defined to you as battery that quantitatively and qualitatively is more culpable than the minimum necessary to accomplish the act of murder.

I need not and I will not again show you those photographs. I think I need not and I will not reiterate again Doctor Presswalla's testimony, for it is abundantly clear and it is uncontradicted how she died.

She was strangled to death with such force and violence by this man's human hand that he left his fingerprints in her neck; and she was beaten so wantonly about the head that there are eight separate and distinct marks besides those across her hands and arms.

Those beatings and those marks are the aggravated battery in this case that is not necessary to accomplish a murder but were necessary under those circumstances for this defendant to accomplish the acts he intended.

On that issue and that issue alone there is enough for you to sentence this defendant to death – [177] because that issue was proved beyond a reasonable doubt.

The other issue is the issue of the defendant's future dangerousness. The Court's instruction on that point is that after you consider his history and his background, there is a probability that he would commit criminal acts of violence and that those criminal acts of violence would constitute a continuing threat to society.

Note the word in there is "probability". No one can predict the future. You need only find that it is probable that it can happen.

These are merely pieces of paper, ladies and gentlemen; but the weight of this evidence is overwhelming. The defendant himself has told you since he was fifteen, except for a sparse three or four years, he has lived behind bars. That has not been enough to prevent the continual mounting of this criminal history. You will

recall that someone in this case who testified to you was referred to as a career criminal.

I submit to you ladies and gentlemen if there is a career criminal, it is Joseph Roger O'Dell for he knows nothing else other than violating the laws of this country. Not only in the State of Virginia but in [178] another state as well; and it is interesting, is it not, that there is a graduation of the seriousness of the offenses from use of a car to a robbery to a murder to an abduction and another robbery and now to another murder?

Isn't it interesting that he is only able to be outside of the prison system for a matter of months to a year and a half before something has happened again?

You have heard Donna Doyle's story. I need not point out the incredible similarities between her and what this case showed happened to Helen Schartner. From the time of day, to the day of the week, to the weather conditions, to the month of the year. I submit to you that what you were listening to was a very close recitation of what Helen could have told us.

We have proved beyond a reasonable doubt that it is probable that this man again will commit some criminal act of violence because all of his criminal acts that he now commits involve violence. Fortunately for Donna Doyle and her family, fortuitous circumstances intervened.

Her husband called the police. The police cars were going back and forth. She was released or [179] escaped, and she survived.

No such fortuitous circumstances intervened for Helen Schartner on that cold rainy night. She died, and

whatever words she stated were last heard by this man. She died in his grasp.

Ladies and gentlemen, I do not ask you to do an easy thing; but I state to you that this man, Joseph Roger O'Dell, has forfeited all right to life within this society as any kind of free human being. Our society is one founded on justice and freedom for everybody.

You have witnessed that this man has been provided by our society every opportunity for a fair and just trial. He has had his right to talk to you. He has had his right to confront witnesses. He has had his right to counsel. He has had his day in court, none of which Helen Schartner had.

Thank you, ladies and gentlemen.

Mr. O'Dell.

MR. O'DELL: You know what it feels like to sit at a table and hear somebody say those things about you? Can you imagine? For twenty months I laid in jail watching my mother die because of this charge. I had laid over there in jail and thought about this case and thought about this case, did everything I could to [180] bring the truth to light.

Now, Mr. Test talks about criminal justice system. He tells You about all the things that I have done in my past. well, ladies and gentlemen, that's all I have heard all my life, how bad I was.

He never told you about any of the good things I did – because it don't look like I did any good things, but I did. I have done some good things; but, ladies and gentlemen, I am not on trial for something I have already

served time in prison for. I paid for that dearly with years and years and years of my life.

Today that's all I have heard is what I did in the past, and I heard about a crime. That's all I heard for twenty months, that I killed this lady.

Now, he tells you that he wants you to bring back a verdict, to sentence me to death. If you recall in my opening statement, I told you I thought this was an atrocious crime; and if you thought in your hearts that I did this crime and you feel that I deserve to die, then I ask you to bring back that verdict; but I ask you to bring back that verdict after I read this – these things here that I have got written down that hasn't been told to you and things that I told you awhile ago that I was going to tell you.

Mr. Test – well, let me ask you this. Would [181] you believe a liar? If I proved to you someone lied and you know they lied, are you going to believe anything they said?

Mr. Test told you when he first come up here and made his opening statement – he said I will prove to you those tire tracks were the defendant's. What did the expert say?

He told you that he would prove to you that the cigarette butt that was found on the trail was the defendant's. What did the expert say?

He told you that he would prove those foot tracks. They never was proven.

Now, ladies and gentlemen, there is a whole lot of other things that has been brought up; and I think if they had been brought up and the truth told to you, that you

wouldn't have come back with a guilty verdict; and as I told you before, I think you are a good jury. I just think you been misled.

* * *

[201] MR. TEST: Ladies and gentlemen, I am very conscious of the hour, so my comments will be very brief. I would note to you the comment of Defendant O'Dell. As he pointed and referred to his past and his criminal record, he said to you, "I may be a bad person with a bad past, but I am not the type of man who would take out and murder this defenseless woman."

I submit to you that sitting there in the form of Mrs. Donna Doyle is someone who lived to tell the tale that Helen Schartner could not and flies directly in the face of what this man just told you.

The defendant spoke to you from this witness stand of his education and what degrees he could get, [202] what his learning has been. I will submit to you that in ten years or eleven years he has learned one thing very well. You do not leave your victim alive to point at you.

The defendant, standing here where I am, asked Mrs. Doyle, "Why didn't I kill you?" What an odd question. I submit to you it's because she prayed so hard and so honestly that her prayer was answered, but the same miracle did not occur for Helen Schartner.

His words, "We are not a society of blood-seeking ghouls," I will agree with. We are a society of fair, honest people who believe in our government and who believe in our justice system; and I submit to you there was a failure in the Florida criminal justice system for paroling this man when they did.

I do not ask you to sentence him to death out of vengeance. Nothing can bring back Helen. That is pointless.

But I submit to you, as I told you once before, this defendant is a night person. This defendant is not only a night person and a convicted murderer. Ladies and gentlemen, he is a night stalker because he is comfortable at night when under the cloak of darkness and in whether conditions that are fitting to him, he can take advantage of moments of opportunity [203] and prey on defenseless women – because that is what he gets off on.

Violence. This man is so full of violence and hatred that he finds the expression for it in winter months when most people are indoors, late night hours when he can go out among those few who are unfortunate enough to be there and pick a victim.

His motive for these crimes is not sex. There is no sexual motive involved. Rape and sodomy are crimes of violence and violence only – because it is violence that this man expresses his personality in. Sex is secondary. It is sexual only because he preys on women.

Your Honor, the instructions.

There is no mistake. The instruction tells you even if you find I have proved to you beyond any reasonable doubt both sentencing alternatives, which I have, you may fix his punishment at death. It is not mandatory, and it should not be, for no one should tell you that you have to vote one way or the other.

You may find that there has been no mitigating evidence – and I submit to you the mitigating evidence

offered amounts to nothing; but you may still sentence him to life in prison, but I ask you ladies and gentlemen in a system, in a society that believes in [204] its criminal justice system and its government, what does this mean?

You have been here for a month and watched it function. What does it mean that we place our trust in our government and in our officials to defend us against foreign nations and to uphold our laws? What does it mean if we don't trust in them and believe that they stand for truth and justice and what is right?

I put it to you ladies and gentlemen. What is right in this case is that this man has forfeited his right to live among us because all the times he has committed crimes before and been before other juries and judges, no sentence ever meted out to this man has stopped him. Nothing has stopped him, and nothing ever will except the punishment that I now ask you to impose.

Thank you, Your Honor.

THE COURT: Soon you will be retiring to your jury room to deliberate. You have previously elected a foreman, so I presume the present one will continue.

The first instruction which I read to you has been reiterated by the Commonwealth is that in order for you to find the defendant – not to find but to recommend the punishment, fix the punishment at death, you must find one of two things as having been done. [205] You can find both or you can find either of the two. So technically you have before you four possible verdicts. You have three verdict slips. Two of them read as follows.

We, the jury, on the issue joined, having found the defendant guilty of the willful, deliberate and premeditated killing of Helen C. Schartner during the commission of, or subsequent to rape, and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

If you find that he is a continuing threat to society, the foreman would execute this particular verdict slip and date the same.

In addition, you are considering the following. We, the jury, on the issue joined, having found the defendant guilty of willful, deliberate and premeditated killing of Helen C. Schartner during the commission of, or subsequent to, rape, and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to the [206] victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

If you find that finding, the foreman is to sign that and date it. In other words, the two verdict slips I read to you concerning the punishment of death, either one or both may be executed by the foreman depending upon your findings.

The third – and that gives you three of the possible verdicts. Double or single or either one of the other.

The fourth possible verdict is we, the jury, on the issue joined, having found the defendant guilty of willful, deliberate and premeditated killing of Helen C. Schartner during the commission of, or subsequent to, rape, and having considered all the evidence in aggravation and mitigation of that offense, fix his punishment at imprisonment for life.

That is the fourth verdict. Only those that are applicable should be executed. The foreman will execute each one and date them.

We will give you the instructions which were read to you, and we will give you the verdict slips. You are now to retire to the jury room and consider [207] your verdict. If you will retire to the jury room.

(The jury retired to consider its verdict at 5:30 p.m.)

THE COURT: Escort the defendant out, please.

Court will stand in recess until the jury returns a verdict.

THE BAILIFF: All rise, please.

(The trial recessed at 5:32 p.m. At 6:42 p.m. the jury indicated they had arrived at verdict.)

THE BAILIFF: Order in the court. Remain seated, please.

THE COURT: Remind everyone in court again. The Court will not tolerate any outbursts or displays of anything. The courtroom will be immediately cleared if such action occurs.

Bring out the jury.

(The jury was recalled to the courtroom, and the following took place in the presence of the jury:)

THE CLERK: Members of the jury, have you reached a verdict?

THE FOREMAN: Yes, we have.

THE COURT: Let me have the jury verdict, please, Mr. Bailiff.

MR. RAY: Stand up.

(The defendant complied.)

[208] THE CLERK: We, the jury, on the issue joined, having found the defendant guilty of the willful, deliberate, and premeditated killing of Helen C. Schartner, during the commission of, or subsequent to rape, and having unanimously found after consideration of his history and background there is a probability that he would commit criminal acts of violence that would constitute a continuous serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death; and we, the jury, on the issue joined, having found the defendant guilty of the willful, deliberate and premeditated killing of Helen C. Schartner, during the commission of, or subsequent to rape, and having unanimously found that his conduct in committing the offense was outrageously wanton, vile or inhuman and it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Members of the jury, are these your verdicts?

JURORS: Yes, they are.

MR. RAY: Poll them. Poll them.

* * *

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

November 13, 1986

* * *

[105] MR. O'DELL: The next point is about the parole. The defendant was not allowed to tell the jury that he would never be allowed parole; and if it's my –

THE COURT: I told you then – correct me if I'm wrong, Mr. Test. There is a case involved that absolutely prohibits the Court from doing such.

MR. O'DELL: That's for the defendant's protection, isn't it, Your Honor?

MR. TEST: That's correct, Your Honor; and quite frankly, when Mr. O'Dell was on the witness stand during the sentencing hearing, he asked him the question anyway, and he answered it anyway. They were told in spite of the Court's instructions.

THE COURT: The law may not be right, but that's the law, Mr. O'Dell.

MR. O'DELL: Your Honor, one of my exhibits is the misconception of jurors on parole.

THE COURT: I think you have a very valid point, but you have a problem which you ought to appreciate. Under present law, you are not eligible for parole. That's a fact, and we all know it.

On the other hand, if the law gets changed, you very well could be. So therefore, it's hard to tell a jury that you're not eligible for parole unless you go [106] to the next step and say under the present law; and naturally, as

the defendant, you would not want that revealed to the jury.

MR. O'DELL: Your Honor, I haven't said a thing during the course of these proceedings, but I hope that my exceptions have been noted to each one of your rulings.

THE COURT: I surely hope so.

MR. O'DELL: Yes, sir. Number 31 on Page 78, Your Honor –

THE COURT: All right.

MR. O'DELL: The defendant was not allowed to explain anything about the abduction charge being dropped for lack of evidence. Mr. Test continually led the jurors to believe that even though the charge may have been dropped, that the thing actually happened.

He also, as I've already said, kept talking about the gun being stuck in her ribs, and that his hypothesis is how it happened; yet I wasn't allowed to explain to the jury that if the lady had been abducted, how could she have been forcibly put in my car and carried across the street as Mr. Test's hypothesis said?

* * *

Supreme Court of Virginia.

Joseph Roger O'DELL

v.

COMMONWEALTH of Virginia.

Record Nos. 861219, 870157.

Jan. 15, 1988.

WHITING, Justice.

Joseph Roger O'Dell, III[1] was indicted and tried before a jury for the capital murder of Helen C. Schartner in the commission of, or subsequent to, rape, Code § 18.2-31(e), as well as for her abduction, rape, and sodomy by force. The trial court granted O'Dell's motion to strike the evidence on the abduction charge. The jury convicted O'Dell on all the remaining counts, and fixed his punishment at 40 years each on the rape and sodomy charges. In the second phase of the bifurcated trial, the jury heard evidence of aggravating and mitigating circumstances and fixed O'Dell's sentence at death, based on his future dangerousness. The trial court imposed the death sentence after a hearing required by Code § 19.2-264.5. Overruling O'Dell's motions to set aside the verdicts, the trial court entered judgments on all three verdicts.

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[1] O'Dell is identified as Joseph Roger O'Dell in virtually all of the documents filed in this case, but the record shows that the indictments were amended without objection to show his name as Joseph Roger O'Dell, III.

We have consolidated the automatic review of O'Dell's death sentence with his appeal from the conviction of capital murder, Code §§ 17-110.1(A), -110.1(F), and given this case priority on our docket, Code § 17-110.2. We also certified O'Dell's appeals of the other two convictions from the Court of Appeals for consolidation with the capital murder appeal. Code § 17-116.06.

O'Dell elected to act as his own counsel, but the trial court appointed standby counsel to aid in his defense. Because O'Dell actively represented himself in substantial portions of the pretrial proceedings and at trial, his appellate counsel suggested in oral argument that we should not require compliance with our contemporaneous objection rule, Rule 5:25. We reject this suggestion. For the reasons enunciated in *Townes v. Commonwealth*, 234 Va. 307, 362 S.E.2d 650 (1987), another capital murder case in which the defendant proceeded *pro se*, we will not consider the merits of those matters to which O'Dell failed to make the proper Rule 5:25 objection at trial. Those matters are the following:

1. The Commonwealth's Attorney's attendance at hearings in which O'Dell attempted to establish his need for experts to be paid by the Commonwealth.

2. O'Dell's later failure to request a ruling on his motion for a change of venue. The motion was made before the venire was examined, the trial court deferred a ruling on the motion, and thereafter O'Dell never requested a ruling.

3. The trial court's alleged failure to "adequately channel the jury's discretion."

4. Venireman Kelly's retention.

5. Venireman Thornton's exclusion.

6. The trial court's failure to sequester the jury.

7. Alleged misstatements of the law "concerning the consequence of the jury's failure to agree on sentence" and the refusal of an instruction on that issue.

8. The admission of evidence indicating a Bible was the only article not stolen from Christianson's car.

9. The exclusion of evidence that Steven Watson was on probation in Virginia when O'Dell made his admission to Watson and when Watson contacted the Commonwealth's Attorney.

10. Restriction of O'Dell's cross-examination of Dr. Sensabaugh.

Additionally, we will not consider a different ground of objection raised for the first time on appeal, Rule 5:25; *see Jones v. Commonwealth*, 230 Va. 14, 18 n. 1, 334 S.E.2d 536, 539 n. 1 (1985), on the following matters:

1. Venireman Villandre's retention. At trial, O'Dell's objection to Villandre's retention as a juror was that he was a former military judge, *not* that Villandre was unable to accord O'Dell his constitutional rights.

2. O'Dell's objection to the admission of evidence of the theft of Christianson's clothing on the ground that it was immaterial.

3. O'Dell's objection that Steven Watson's testimony was more prejudicial than probative.

4. O'Dell's objection to the inclusion of the word "shall" in Instruction 17.

5. O'Dell's constitutional objections to the admission of hearsay statements in the probation officer's report.

Furthermore, pursuant to Rule 5:27(e), we will not consider the following assignments of error which were not argued on brief: X, XIV, XV, XVIII(b), (e)(f), (g) and (h), XXIII, and XXXI.

I

FACTS

The Commonwealth prevailed before the jury. Therefore, in conformity with familiar appellate principles, we consider the facts in the light most favorable to the Commonwealth.

On Tuesday, February 5, 1985, the victim, Helen Schartner, left a night club in Virginia Beach known as the County Line Lounge about 11:30 p.m. O'Dell left the same club sometime between 11:30 p.m. and 11:45 p.m. The next day, February 6, 1985, Schartner's car was found in the parking lot of the County Line Lounge. Near 3:00 p.m. the same day, Schartner's body was discovered among the reeds in a field near a muddy area behind another club, across the highway from the County Line Lounge. Tracks from tires consistent with the tires on O'Dell's car were discovered in an area near Schartner's body.

Schartner had been killed by manual strangulation. She also had eight separate wounds on her head caused by blows from a handgun equipped with a cylinder. These head wounds produced extensive bleeding. A

handgun with a cylinder was seen in O'Dell's car about 10 days prior to the murder.

Not more than two and a half hours after Schartner left the County Line Lounge, O'Dell entered a convenience store with blood on his face and hands, in his hair, and down the front of his clothes.

Vaginal and anal swabs disclosed the presence of seminal fluid in the victim's vagina and anus containing enzymes consistent with those in O'Dell's seminal fluid.

O'Dell had been living in the home of a woman friend, Connie Craig. Approximately a week before the murder, Craig ordered O'Dell from the premises. O'Dell called Craig about 7:00 a.m. on Wednesday, the morning after the murder, said that he had vomited blood all over his clothes,[2] and stated that he wanted to talk with her before he left for Florida.

When O'Dell reached Craig's house at about 7:30 a.m., he said he wanted to sleep, and he slept until 9:30 or 10:00 o'clock that evening. When O'Dell awakened, he asked Craig how to remove the blood from his new blue-gray jacket.

The next day, Thursday, about 1:00 p.m., O'Dell called Craig from his place of work and told her he had put his clothes in her garage, but he intended to take them out the following day. After the telephone conversation, Craig read the local newspaper's account of the

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[2] In an alibi inconsistent with the one he had given to Craig, O'Dell told the police the blood came from a nose bleed caused by being struck while attempting to stop a fight at another club on the night of February 5.

murder of Schartner. The account said the victim had last been seen at the County Line Lounge. When Craig remembered that O'Dell customarily visited the County Line Lounge on Tuesday nights, "something clicked." Craig went to her garage and found a paper bag containing four pieces of bloody clothing, including a pair of jeans which also had mud on them. Craig brought these clothes into the house and called the police.

Forensic evidence established that the dried blood on two of O'Dell's articles of clothing was the same type as Schartner's in each of the 11 blood classification systems analyzed. Only three out of a thousand persons are in this blood classification. O'Dell's blood was not the same type as Schartner's. O'Dell's car was later seized and searched, and dried blood found on objects in the car also had several enzyme markers consistent with Schartner's blood, but not O'Dell's.

During his incarceration, O'Dell told Steven Watson, a fellow inmate, he had strangled Schartner after she refused to have sexual intercourse with him.

II

PRETRIAL MATTERS

A

Speedy Trial

After the General District Court's finding of probable cause, O'Dell was incarcerated for 18 months before his trial commenced. Citing this delay, O'Dell claims violations of both constitutional and statutory speedy trial protections. We find no merit in either claim.

If the delay in the commencement of trial is attributable to a defendant, there is no violation of his constitutional right to a speedy trial. *See Barker v. Wingo*, 407 U.S. 514, 528-29, 92 S.Ct. 2182, 2191, 33 L.Ed.2d 101 (1972); *Stephens v. Commonwealth*, 225 Va. 224, 230, 301 S.E.2d 22, 26 (1983). Code § 19.2-243 requires that the trial of an incarcerated defendant commence within five months after probable cause is found. This statutory requirement, however, does not apply to delays caused by continuances granted on the incarcerated defendant's motion.

The orders in the record show O'Dell requested the following continuances of the trial: May 16, 1985 to August 20, 1985; September 24, 1985 to November 12, 1985; November 12, 1985 to February 10, 1986; February 10, 1986 to March 31, 1986; March 31, 1986 to June 30, 1986; June 30, 1986 to August 11, 1986, or a total of approximately 14 months. Because only four months of the period are chargeable to the Commonwealth, we find no constitutional or statutory violation of O'Dell's speedy trial rights.

B

Suppression Motion

O'Dell moved the trial court to suppress the introduction of his clothing in evidence because of a police search and seizure allegedly in violation of his constitutional rights. O'Dell's grounds for suppression ignore the facts here and the controlling constitutional principles.

First, O'Dell contends Craig's consent to the police search of her garage was invalid because of his expectation of privacy in the garage. Craig had ordered O'Dell to leave her house a week before the search, and thereafter he had been living in his car. A few days after she evicted O'Dell, Craig put the clothing he had left in her house on her front porch. When O'Dell called her the afternoon before the murder, Craig told O'Dell his clothes were on the front porch. Some time after the murder, between 2:00 a.m. and 7:00 a.m., O'Dell came by Craig's house and picked up his clothes. O'Dell changed clothes, put his bloody clothes in a paper bag, and placed the bag in Craig's garage.

We need not decide whether O'Dell had an expectation of privacy in the garage. Craig, as owner with a joint right to possession, had the right to consent to its search. *See United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974); *cf. Chapman v. United States*, 365 U.S. 610, 617-18, 81 S.Ct. 776, 780, 5 L.Ed.2d 828 (1961) (landlord whose tenant had *not* forfeited his right to exclusive possession of the premises cannot consent to search of demised premises).

O'Dell next contends the police officers violated his constitutional rights in ordering Craig to remove his bloody clothes from the paper bag he had left in the garage. O'Dell's reference to the record, however, shows that Craig had already removed the clothing from the bag, and the clothing was on her kitchen floor when the officers arrived.

C

Discovery Matters

(1) *Failure to Provide Reciprocal Discovery*

O'Dell was required to disclose information about his experts to support his request for the Commonwealth's payment of those experts because of O'Dell's indigency. Apparently recognizing that a defendant has no general constitutional right to discovery in a criminal case, *see Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 845, 51 L.Ed.2d 30 (1977); *Watkins v. Commonwealth*, 229 Va. 469, 479, 331 S.E.2d 422, 430-31 (1985), *cert. denied*, 475 U.S. 1099, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986), O'Dell argues that he had a constitutional right of reciprocal discovery under the facts of this case, requiring the Commonwealth to furnish not only the names of all its experts but the substance of their expected testimony.[3]

O'Dell had extensive pretrial information about the background and conclusions of the Commonwealth's expert who did the blood testing, but O'Dell contends he did not know the Commonwealth planned to use three experts to establish the general scientific acceptance of a technique used to analyze and type samples of dried blood known as "multisystem electrophoresis." Nine months before trial, O'Dell knew the Commonwealth's

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[3] Obviously, none of this is required under Rule 3A:11(b). *See Lowe v. Commonwealth*, 218 Va. 670, 678-79, 239 S.E.2d 112, 117-18 (1977), *cert. denied*, 435 U.S. 930, 98 S.Ct. 1502, 55 L.Ed.2d 526 (1978).

forensic analysts intended to use an electrophoretic technique to identify the dried blood stains on his clothing as being consistent with the blood of Schartner. O'Dell also was aware of the Commonwealth's burden to establish the general acceptance of this technique in the scientific community. In fact, as early as seven months before trial, O'Dell was in contact with Dr. Benjamin Grunbaum, one of the experts O'Dell planned to use to attack the use of electrophoresis on dried blood samples. At least three and a half months before trial, O'Dell was also in contact with another forensic scientist, Dr. Diane Lavett. O'Dell requested an out-of-state witness summons for each of these parties a month before trial.

Dr. Lavett did testify at the trial that the scientific community had not accepted this technique of typing dried blood samples. Dr. Grunbaum could not appear because of a scheduling conflict. Assuming, but not deciding, that the Commonwealth should have furnished O'Dell with its experts' names and the substance of their expected testimony before trial, we conclude that this failure caused no prejudice to O'Dell, who had already contacted his own experts in the field.

(2) *Watson's Plea*

O'Dell claims he was improperly denied discovery of a plea agreement he alleged existed between the Commonwealth and its witness Steven Watson. He cites *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), in support of his right of such discovery. Neither case indicates a defendant has a right to

discover the existence or contents of a plea agreement *prior* to trial. Instead, these cases turn upon undisclosed plea agreements with witnesses who had *already* testified. There is no general constitutional right to such pre-trial discovery in a criminal case. *See Weatherford*, 429 U.S. at 559, 97 S.Ct. at 845; *Watkins*, 229 Va. at 479, 331 S.E.2d at 430. The trial court correctly denied this discovery.[4]

D

Failure to Preserve Evidence

O'Dell claims the trial court should have excluded the electrophoretic test results because the Commonwealth failed to preserve properly the blood-stained clothing for his independent testing, in violation of his constitutional rights. O'Dell also asserts the Commonwealth's expert, who performed the testing, did not properly document all her procedures.

The evidence at trial demonstrated that after a few weeks dried blood cannot be successfully tested unless it has been kept under refrigeration. O'Dell moved for an independent examination months after the Commonwealth performed its tests. The Commonwealth does not usually keep seized articles under refrigeration after it has analyzed them, and it did not do so in this case. The Commonwealth stored the clothing in a routine manner, but, because the blood stains had deteriorated, O'Dell's

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[4] At trial, the court permitted O'Dell to fully develop all pre-trial contacts and negotiations Watson had with the Commonwealth. O'Dell was unable to prove a plea agreement existed between Watson and the Commonwealth.

experts did not have an opportunity to run independent tests.

O'Dell argues his constitutional rights were violated because an independent examination may have proven favorable to him, and a review of the test procedures which should have been documented may have demonstrated errors in the Commonwealth's testing. In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), the Supreme Court held that a state must disclose to an accused all favorable evidence material to his guilt or punishment. In *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), the Supreme Court concluded that, in the absence of; bad faith, deviation from normal practice, official animosity toward an accused, or a conscious effort to suppress exculpatory evidence, a state's failure to preserve evidence seized in a criminal case is not a violation of a defendant's constitutional rights unless the evidence "both possess[ed] an exculpatory value that was apparent before the evidence was destroyed, and [was] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489, 104 S.Ct. at 2534.

Assuming, but not deciding, that a duty to preserve the condition of evidence and to document test procedures is the same as a duty not to destroy evidence, O'Dell failed to show any of the Trombetta conditions for excluding this evidence. We find no bad faith, deviation from routine, official animosity toward O'Dell, or conscious effort to suppress exculpatory evidence. Nor has O'Dell shown that the evidence possessed an apparent exculpatory value before it was placed in storage; to the

contrary, the test results indicated the blood on his jacket was that of Schartner. While O'Dell did not have an opportunity to have independent tests performed on the articles, he had, and used, other means to challenge the validity of the tests the Commonwealth performed. The Commonwealth examiner's records were made available to O'Dell's experts, and O'Dell made full use of them in presenting his challenges to the testing procedure.

We find no violation of O'Dell's constitutional rights in the manner of testing or storage of the evidence.

E

Expert Witnesses

O'Dell complains of the trial court's rulings on a number of matters dealing with expert witnesses. We find no merit in any of his complaints for the reasons which follow.

On O'Dell's motion, the trial court appointed Dr. Joseph Guth, a forensic scientist, to assist him. In justifying his need for the expert, O'Dell specifically mentioned the necessity for an independent survey of hair and blood samples, tire and foot casts, and laboratory techniques used in analyzing this evidence. Dr. Guth did considerable work on some of these matters, his investigation extended over a number of months, and necessitated a number of postponements of the trial date. When Dr. Guth released his tentative report to O'Dell, O'Dell was dissatisfied with at least one conclusion. O'Dell made a motion in *limine* to prevent the Commonwealth from seeing that portion of the report which was unfavorable

to O'Dell. O'Dell indicated he would examine Dr. Guth only on his investigation of the blood stains and moved, therefore, that the Commonwealth's access to the report should be limited to Dr. Guth's analysis of the blood stains.

The permissible scope of cross-examination of a witness is a matter of discretion by a trial court. *See Bunch v. Commonwealth*, 225 Va. 423, 438, 304 S.E.2d 271, 279-80 (1983). O'Dell has shown no abuse of discretion in this case.

O'Dell claims he was entitled to an *ex parte* hearing on the necessity of the Commonwealth's funding of experts to assist him in his defense. O'Dell admits none of the proposed experts would address the question of his sanity, as in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); they were all forensic scientists. O'Dell had no constitutional right requiring the Commonwealth to provide funding of this type of expert assistance. *Townes v. Commonwealth*, 234 Va. at 332, 362 S.E.2d at 664; *Gray v. Commonwealth*, 233 Va. 313, 356 S.E.2d 157, *cert. denied*, 484 U.S. ___, 108 S.Ct. 2097, 98 L.Ed.2d 158 (1987).

O'Dell argues that the trial court permitted an "overloading of prosecution experts." Neither the Supreme Court case of *Ake*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53, nor any of the other cases O'Dell cites, deals with an alleged "overloading of prosecution experts."

We find no logical or constitutional reason for adopting a *per se* rule requiring the Commonwealth to furnish an indigent defendant with a number of experts equal to

the number the prosecution may call. If the Commonwealth provided O'Dell with the "basic tools of an adequate defense," *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 433, 30 L.Ed.2d 400 (1971), it complied with the constitutional requirements. The Commonwealth need not supply O'Dell with all services that may be available. *See Ross v. Moffitt*, 417 U.S. 600, 616, 94 S.Ct. 2437, 2446-47, 41 L.Ed.2d 341 (1974). The testimony of Dr. Guth and Dr. Lavett, the experts supplied to O'Dell by the Commonwealth, and the detailed, articulate, and informed cross-examination of the Commonwealth's experts by court-appointed counsel give ample evidence of the "basic tools of defense" supplied to O'Dell.

O'Dell cites the case of *United States v. Bass*, 477 F.2d 723, 725 (9th Cir.1973), as "condemning appointment of expertise disproportionately to prosecution." In fact, the Bass court merely held that a defendant who is tried in a federal court is entitled to his own psychiatric expert under a specific federal statute. In *Bass*, the government already had two psychiatric experts, yet the court said nothing *whatever* about that being a disproportionate number, although the trial court had appointed only one psychiatrist to assist the defendant.

The trial court had the discretion to decide whether O'Dell needed an expert or experts, and the burden is on O'Dell to show that this discretion was abused. *See Quintana v. Commonwealth*, 224 Va. 127, 135, 295 S.E.2d 643, 646 (1982). O'Dell has not carried that burden.

Additionally, we note that O'Dell moved for additional experts only a short time before trial. If the trial court had granted the motion, it would have necessitated

yet another continuance. The motion for an expert must be made in a timely fashion. *Moore v. Kemp*, 809 F.2d 702, 710 (11th Cir.), *cert. denied sub nom. Moore v. Kemp*, 481 U.S. 1054, 107 S.Ct. 2192, 95 L.Ed.2d 847 (1987).

F

O'Dell's Representation

(1) *Discharge of Peter Legler*

O'Dell objected to the discharge of his court-appointed counsel, Peter Legler. O'Dell argues not only was he denied the benefit of Legler's participation as counsel, but he was also denied a hearing as to the "reasons . . . or ramifications" of such disqualification of counsel.

We reject O'Dell's contentions. Legler requested to withdraw because of a potential conflict of interest in Legler's representation of O'Dell and another of his clients. Apparently, Legler's other client was a man named David Pruett who, according to O'Dell, had confessed to the Schartner murder. While O'Dell was willing to waive the conflict, there is no showing that Pruett was. Where one lawyer represents multiple clients with divergent interests, *all* clients must waive the potential conflict of interest in order for the attorney to proceed. DR 5-105(C); *see* DR 5-105(B). O'Dell had no right to force Legler to continue as counsel under these circumstances.[5]

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[5] The complaint that O'Dell was not adequately warned of the dangers of waiving counsel with a conflict of interest has nothing to do with this case. O'Dell did not waive the conflict, and the trial court released counsel with the conflict from representation of O'Dell.

The case of *In re Paradyne Corp.*, 803 F.2d 604 (11th Cir.1986), which O'Dell cites, is inapposite. That case involved counsel who were *willing* to continue to represent the defendant, but who were forced by the trial court to withdraw because of an alleged conflict of interest. *Id.* at 608-09. Legler *wanted* to withdraw.

(2) *Standby Counsel's Alleged Conflict of Interest*

Next, O'Dell claims Paul Ray, standby defense counsel appointed to succeed Legler, acquired a conflict of interest during his representation of O'Dell which disqualified him. Ray sought the appointment of a psychiatrist to determine O'Dell's mental state at the time of the murder, his competence to stand trial, and his future dangerousness. O'Dell resisted the examination. Ray responded:

> [T]his defendant is apparently telling the court he does not want a psychiatric evaluation. If that is true, then he should be put under oath and I should examine him on the record because I don't want to get into any problem further on down the road in regard to this particular issue, but I just put that to the Court.

O'Dell *assumes* Ray desired to protect himself against a later charge of ineffective assistance of counsel, and asserts this gave rise to the alleged conflict of interest. O'Dell quoted (and designated for printing in the appendix) only a part of what Ray said, and we think O'Dell misinterpreted what Ray meant. Our reading of Ray's entire statement convinces us that he was referring to the

possibility that O'Dell might later claim he was incompetent to stand trial.

Even if Ray's reason was a desire to protect himself against a later charge of ineffective assistance of counsel, we do not believe that reason, standing alone, constitutes a conflict of interest warranting disqualification. O'Dell cites no case which supports his contention. His reliance upon *United States v. Ellison*, 798 F.2d 1102 (7th Cir.1986), is misplaced. In *Ellison*, the court, considering a claim of ineffective assistance of trial counsel, held that trial counsel had a conflict of interest which precluded him from testifying against the defendant *and* representing him at the same time. Accordingly, we find O'Dell's argument without merit.[6]

(3) *Failure to Appoint Standby Co-Counsel*

O'Dell's complaint of the trial court's failure to appoint co-counsel to act with Ray is premised on Ray's alleged conflict of interest. That premise having failed, we reject this assignment of error.

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[6] At various times during the proceedings in the trial court, O'Dell complained about the quality of Ray's representation. After all the evidence was submitted in the guilt phase, O'Dell told the trial court: "I think Mr. Ray has done an outstanding job, which is contradictory to all my allegations previously."

(4) *Warnings of Self-Representation*

Relying upon *Superintendent v. Barnes*, 221 Va. 780, 273 S.E.2d 558 (1981), O'Dell asserts he was not adequately warned of the dangers of self-representation. Unlike that case, in which the trial court never warned the defendant of such dangers, the record in this case is replete with the trial court's warnings to O'Dell. Moreover, as we noted in *Barnes*, the Supreme Court "has never held that the absence of such a cautionary instruction, standing alone, defeats a waiver." 221 Va. at 784, 273 S.E.2d at 561. Additionally, O'Dell's extensive experience in the criminal justice system and his demonstrated skill in raising objections in this trial belie any claim now that he did not understand the dangers of self-representation. For these reasons, we reject this argument.

III

JURY MATTERS

A

Unilateral Right to Bench Trial

O'Dell extrapolates from his constitutional right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), or to represent himself, *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and his constitutional rights to a jury trial, U.S. Const. amend. VI; Va. Const. art. I, § 8, a constitutional right to demand a trial by a judge. O'Dell overlooks the Commonwealth's interest.

While the Commonwealth has no voice in O'Dell's decision as to who will defend him, it does have an equal

voice with O'Dell in the decision whether the case will be tried by a judge. Va. Const. art. I, § 8; *Pope v. Commonwealth*, 234 Va. 114, 122, 360 S.E.2d 352, 358 (1987). Accordingly, we reject this contention.

B

Venire Not a Valid Cross-Section

We deny O'Dell's various challenges to the venire for several reasons:

(1) O'Dell introduced no evidence to substantiate his claim that the venire was unrepresentative of the community. His reference to census figures in footnotes to his brief, even if they supported his claim, did not make these figures a part of the evidence. *See Lockhart v. McCree*, 476 U.S. 162, 173, 106 S.Ct. 1758, 1764, 90 L.Ed.2d 137 (1986); *Reil v. Commonwealth*, 210 Va. 369, 373, 171 S.E.2d 162, 165 (1969).

(2) O'Dell asserts the trial court erred in directing the clerk not to draw jurors who had served on a capital murder case during the then-current term. The clerk apparently misunderstood and excluded the first 24 veniremen who had served on any criminal case during that term, but the clerk did not exclude such persons from the next 28 veniremen who were drawn. O'Dell makes no showing of prejudice arising from these matters.

Also, O'Dell overlooks the provisions of two Code sections in claiming these actions of the trial court and the clerk violated Code §§ 8.01-349, -350.1, -351, and -352 and compel a new trial. Code § 8.01-355 permits the trial

court to excuse any jurors whose names were drawn for service on a particular panel and, thus, authorizes the trial court's direction to the clerk. The clerk's misunderstanding of the trial court's direction and the subsequent exclusion of all jurors who had served on any felony panel in the then-current term was an irregularity under Code § 8.01-352(A), which is cured under Code § 8.01-352(B), because the exclusion was not intentional, nor did it operate to cause any prejudice to O'Dell. Accordingly, we find no reversible error in the selection of the venire.

C

Failure to Allow Additional Challenges

O'Dell argues that he should have been permitted an unspecified number of additional peremptory challenges because a number of prospective jurors had ties to the military or law enforcement. No Virginia or Federal authority supports this assignment of error, and since O'Dell failed to show deficiencies in the composition of the jury, we reject his claim of entitlement to additional challenges.

D

Questions to Venire by Court and Commonwealth's Attorney

(1) *Comments Regarding Jury's Role in Death Penalty*

O'Dell contends both the Commonwealth's Attorney and the trial court attempted to diminish the jury's sense

of responsibility in this capital case by stressing that the jury would merely recommend the death penalty rather than actually "impose" it. In *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court prohibited comment by a trial court or argument by a prosecutor that the jury's determination of a death sentence is automatically appealable. In *Frye v. Commonwealth*, 231 Va. 370, 397, 345 S.E.2d 267, 286-87 (1986), the Commonwealth's Attorney argued to the jury that the responsibility for fixing the death sentence was not the jury's, but that of the court. The trial court overruled a defense objection, stating in the jury's presence that its verdict would be a recommendation. We reversed, citing Caldwell.

The trial court and the Commonwealth's Attorney did make statements to the venire in voir dire to the effect that the jury would "recommend" the sentence. These statements, which were a small part of the information given to the jury, were never repeated in the trial. A review of the entire record shows that the jury explicitly was told it actually *fixed* the punishment, as the first instruction and the form of the verdict clearly stated. Therefore, we find no prejudicial error in these remarks.

(2) *Nature of Commonwealth's Voir Dire Questions*

The trial court and the Commonwealth's Attorney asked fewer questions of the venire designed to eliminate those veniremen favoring an automatic death sentence upon a capital murder conviction than they did to eliminate those veniremen unalterably opposed to a death

sentence. O'Dell argues that, taken as a whole, these questions were, therefore, "slanted so as to impress the jury with the probability of the death penalty in an unconstitutional manner." O'Dell cites *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981), in support of this argument. In *Patterson*, we held it was error for a trial court to refuse to ask *any* questions testing a juror's prejudice toward automatic death sentences in capital murder cases. *Id.* at 658-59, 283 S.E.2d at 216. Our review of the questions asked in this case by the trial court and Commonwealth's Attorney does not reveal an effort to impress the jury with the probability of the imposition of the death penalty. We decline to establish a rule requiring an equal number of questions to be posed during *voir dire* on opposing issues, so long as each issue is fairly developed.

(3) *Commonwealth's Comments on O'Dell's Testifying*

O'Dell is in error when he claims the Commonwealth's Attorney "went into extensive discourses [to the venire] on the merits of Mr. O'Dell taking the stand." O'Dell cites only one instance to support his claim. The "discourse" occurred after O'Dell had asked venireman Villandre the following questions:

> MR. O'DELL: You as a fair-minded citizen, after the Commonwealth has presented its version of the case, would you expect to hear the defendant's side of the case?
>
> MR. VILLANDRE: Yes.
>
> MR. O'DELL: Would you expect the defendant to take the stand and testify?

MR. VILLANDRE: According to the judge, he doesn't have to.

MR. O'DELL: Yes, sir. If the defendant did not testify, would you think that he was trying to hide something or would that indicate to you in any kind of way that he was guilty?

MR. VILLANDRE: I would try to think it did not.

MR. O'DELL: Would there be some doubt in your mind – the fact that the defendant is defending himself and the fact that he didn't take that stand? It's kind of premature I guess for me to ask you this, but do you think that it would in any kind of way affect your impartiality?

MR. VILLANDRE: There is a possibility that it might. As you said, that is a very difficult thing.

O'Dell opened the door on the subject, requiring the Commonwealth to ask a series of questions intended to make it clear to prospective juror Villandre that no negative inference could be drawn from O'Dell's failure to testify.

Accordingly, we reject this contention.

E

Retention or Exclusion of Veniremen

O'Dell argues the trial court erroneously retained some veniremen, and erroneously excluded others. The trial court saw and heard the examination of each venireman, and its findings are entitled to great weight. We will not reverse those findings on appeal unless manifest

error has been shown. *Gray*, 233 Va. at 339, 356 S.E.2d at 171; *see Wainwright v. Witt*, 469 U.S. 412 at 431, 105 S.Ct. 844 at 856, 83 L.Ed.2d 841 (1985). No such error has been shown in any of the following instances on which O'Dell bases his claim.

(1) *Claimed Errors in Retention*

O'Dell assigns error to the trial court's retention of a number of prospective jurors on the panel despite various alleged disqualifications.

O'Dell contends Mr. Esenburg was disqualified because of an interest in the outcome of the case. Esenburg was an alternate who was struck (presumably by O'Dell). Because none of the alternates who heard the evidence participated in the jury's deliberations, the error, if any, was harmless. *Gray*, 233 Va. at 339, 356 S.E.2d at 171.

O'Dell challenges the retention of two veniremen, Mr. Thurston and Mr. Villandre, on the panel because they allegedly could not "totally disregard the effect of [O'Dell's] assertion of his Fifth Amendment [privilege against self-incrimination] and would not give him the benefit of the presumption of innocence." O'Dell argues that Thurston's answers to the following question propounded by O'Dell established Thurston's unwillingness to give O'Dell the benefit of his constitutional rights.

MR. O'DELL: . . . The fact that the defendant was arrested and indicted by the grand jury of Virginia Beach – does that make you feel that he knows something about the crime or that he is guilty of the crime?

> MR. THURSTON: Not that he is guilty. That he may know something about it because otherwise he would not have been indicted. There must be some doubt in someone's mind.

Thurston's other statements made it abundantly clear that Thurston would accord O'Dell his constitutional rights, and we find nothing in this exchange which demonstrates an inference of guilt from O'Dell's arrest and indictment.

O'Dell objected to Mr. Foust as a venireman because Foust said he would give a police officer's testimony more weight than that of the average citizen. Foust responded in the affirmative to the following questions:

> MR. O'DELL: [I]f a police officer was to take the stand and testify to certain facts in this case and you listened to his testimony real closely and an average citizen came in and testified on the stand, would you give that police officer's testimony more weight than you would the average citizen?
>
> MR. O'DELL: If that police officer's testimony conflicted with someone else's testimony that was not a police officer, would you tend to believe the police officer more so than the other person?

Bias cannot be presumed solely because a prospective juror believes a police officer's training and experience in observing and recounting events might make the officer's account more accurate than that of an ordinary witness, provided the prospective juror does not ignore differing circumstances of observation, experience, and bias which may be disclosed by the evidence. Foust's freedom from

bias was abundantly clear in this record. For that reason, we reject O'Dell's contention that Foust had a bias in favor of police testimony.

(2) *Claimed Errors in Exclusion*

O'Dell contends the trial court erroneously excluded the following three members of the jury panel for cause. We disagree for the reasons which follow.

O'Dell says the trial court struck Mrs. McClellan as soon as she stated that she would require a "moral certainty" to convict rather than a "reasonable doubt." On the contrary, the record discloses two pages of testimony following Mrs. McClellan's statement in which O'Dell unsuccessfully attempted to rehabilitate McClellan. Although O'Dell argued at trial that his subsequent questions "covered the beyond a reasonable doubt aspect of the case," our review of the transcript reveals that O'Dell never asked McClellan if she would apply the reasonable doubt standard.

The record also indicates a number of instances when McClellan paused or failed to answer important questions on *voir dire*, as well as her considerable ambivalence about imposing the death penalty and her significant equivocation about her understanding of the standard of proof required in this case.

Both Mrs. Jones and Mr. Fiutko indicated they might not be able to follow the court's instructions because of their feelings about the imposition of the death penalty. A juror may be struck from the panel under the Federal Constitution if his "views would prevent or substantially

impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980); *see Lockhart*, 476 U.S. at 174, 106 S.Ct. at 1765; *Wainwright v. Witt* 469 U.S. at 424, 105 S.Ct. at 852.

IV

GUILT PHASE

A

Evidentiary Questions

(1) *Admission of Electrophoretic Tests*

O'Dell argues the court improperly admitted in evidence the results of the electrophoretic tests, and assigns a number of grounds in support of his argument. We find none of them to have merit.

First, O'Dell argues that he was entitled to a separate hearing out of the presence of the jury to enable the trial court to make a determination of the admissibility of the test results. A separate hearing is generally advisable to avoid a possible mistrial in the event a trial court concludes the tests are not sufficiently reliable to be introduced in evidence. Because we find the trial court did not err in admitting in evidence the results of the electrophoretic tests, we conclude that O'Dell has not been prejudiced by the trial court's failure to conduct a hearing out of the jury's presence.

Second, O'Dell contends the Commonwealth failed to show the use of the electrophoretic technique on dried

blood stains was generally accepted by the scientific community or sufficiently reliable for the results to be admissible in evidence. He urges upon us the so-called "*Frye* test," contending that a trial court must be convinced not only of the reliability of the test, but also of its general acceptance by the scientific community in the particular field in which the test belongs. *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923). The "*Frye* test" has generated considerable criticism. *See, e.g.*, Moenssens, *Admissibility of Scientific Evidence – An Alternative to the Frye* Rule, 25 Wm. & Mary L. Rev. 545 (1984).

We see no reason to adopt the *Frye* test. Even if it were the law in Virginia, the evidence was sufficient to meet it.[7] The testimony of Dr. George Sensabaugh, a professor of biomedical and environmental health sciences at the University of California, with extensive experience in the field of forensic biology and medical microbiology, indicated the multisystem method of electrophoresis used to test Schartner's blood and O'Dell's

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[7] We note O'Dell's argument that the trial court merely took judicial notice of the reliability of the electrophoretic technique. The trial court, when describing the grounds for admitting the tests, said "The Court has ruled and taken judicial notice that the procedural concept of electrophoresis is generally accepted. I think Dr. Sensabaugh has more than shown that it is generally accepted in the United States."

Judicial notice involves the admission of a fact in evidence without proof of that fact because it is commonly known from human experience. *Darnell v. Baker*, 179 Va. 86, 93, 18 S.E.2d 271, 275 (1942). The trial court's full statement indicates it did not take judicial notice of the reliability of the electrophoretic technique; instead, it found it as a fact, based on the testimony of Dr. Sensabaugh.

blood was reliable and generally accepted in the field of forensic science. O'Dell's second argument, that the evidence of a test's reliability and acceptance must come from an "independent" expert, is also met. Dr. Sensabaugh was such an "independent" expert, and, therefore, met this condition.

O'Dell's third argument centers upon the reliability of the method used to perform the tests on the dried blood samples, the experience and competence of the examiner who performed the tests, and the manner in which she did the tests. Each side introduced evidence supporting its respective positions on these issues.[8] All three of these questions were factual issues involving the weight of the evidence rather than its admissibility, and were properly resolved by the jury. *See Ellis v. International Playtex, Inc.*, 745 F.2d 292, 303 (4th Cir.1984); *cf. Walrod v. Matthews*, 210 Va. 382, 389, 171 S.E.2d 180, 186 (1969).

(2) *Witness Watson*

O'Dell maintains the trial court should have allowed him to cross-examine Watson about letters Watson had

[8] O'Dell's evidence came primarily from Dr. Diane Lavett, a forensic scientist. O'Dell cites a number of articles and studies in various publications allegedly questioning the validity of the tests. These articles apparently contain factual information and conclusions and could only be considered by the court after being properly placed in evidence. *Cf. Hopkins v. Gromovsky*, 198 Va. 389, 394-95, 94 S.E.2d 190, 193-94 (1956). None of the articles and studies was introduced in evidence and, therefore, we do not consider them.

written to three Virginia circuit court judges a number of years prior to this crime. O'Dell did not tender the letters as exhibits, and we find none of them in the record. Therefore, we must assume the trial court correctly ruled that the letters were not sufficiently relevant to show Watson's bias. Furthermore, the trial court made it clear at the time of its ruling that O'Dell was not precluded from introducing any other evidence which might show Watson solicited leniency in the terms of his probation in exchange for his testimony.

O'Dell argues Watson was not permitted to answer his question, "Did you tell Larry Talkington, your codefendant in that case you were extradited back on, in forty or fifty other B & E's, breaking and enterings,[9] that if you got caught you would like to keep yourself from going to jail because you had been there before?" (Emphasis added.) When the Commonwealth's objection to the question was argued before the trial court, O'Dell said his question was, "Did you tell Larry Talkington, your codefendant in that instance that you was extradited back on, that if you got caught you would *lie* to keep from going to jail in those forty or fifty B and E's because you had been to jail there before?" (Emphasis added.)

We will not speculate what the answer might have been to these questions. The answers were not proffered for the record. Furthermore, when O'Dell put Talkington on the stand, he never asked Talkington about Watson's alleged statement. We will not consider testimony which

[9] O'Dell later admitted he was wrong in characterizing the charges as 40 or 50 B & E's, there were only four or five B & E's.

the trial court has excluded without a proper showing of what that testimony might have been. *Wyche v. Commonwealth*, 218 Va. 839, 843, 241 S.E.2d 772, 775 (1978); *Whittaker v. Commonwealth*, 217 Va. 966-968-69, 234 S.E.2d 79, 81 (1977).

Likewise, we will not consider O'Dell's objection to the trial court's refusal to permit Talkington to testify as to whether Watson had ever been a police informant. No answer was proffered. Although O'Dell complains he "was not even permitted to proffer the questions he wished to pursue on this line," the record shows that the trial court merely refused to delay jury proceedings for the proffer; O'Dell could have made the proffer after the jury retired. Later, without having made the proffer, O'Dell asked that Talkington be excused. Accordingly, we will not consider O'Dell's complaint of a denial of proffer.

B

Other Rulings as to Witness Watson

O'Dell characterizes Watson's conflicting statements concerning the number of his prior felony convictions as perjury. At one time, out of the presence of the jury, Watson said he had six convictions, and later, before the jury, he correctly said he had seven convictions. O'Dell did not question Watson's explanation of his confusion as to a seventh conviction on concurrent charges in West Virginia. The jury was given the correct number of Watson's convictions, and O'Dell suffered no prejudice.

O'Dell is wrong in his claim that the trial court refused to hold a hearing to determine the admissibility

of Watson's evidence. The appendix and transcript reflect that the trial court held a separate hearing in which O'Dell fully exercised his opportunity to question Watson and to argue the matter of admissibility.

C

Instruction

O'Dell assigns error to the inclusion of the italicized language in the following instruction:

> The Court instructs the jury the defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. *This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence.* However, suspicion or probability of guilt is not enough for a conviction. There is no burden on the defendant to produce any evidence.
>
> A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

We find this language properly balanced the instruction as to what constitutes proof beyond a reasonable doubt. Moreover, we find the disputed language is consistent with the language of the standard instruction on circumstantial evidence the trial court gave the jury. We

conclude that the trial court did not err in granting this instruction.

D

Sufficiency of the Evidence to Convict

O'Dell, characterizing the case against him as "non-existent" apart from the serological evidence, argues the court should have directed the verdicts of acquittal on all three indictments. Because the trial court properly admitted the serological evidence and because there was other evidence to support the conviction, we need not consider this assignment of error. We find the evidence adduced at trial to be sufficient to convict O'Dell of all three crimes.

V

PENALTY PHASE

A

Admissibility of Evidence of Future Dangerousness

(1) *Unadjudicated Crimes and Juvenile Findings of Not Innocent*

O'Dell objects to the admission of evidence of a prior attempted rape in Florida, claiming the Florida court dismissed the charge on the merits prior to trial for lack of evidence. In support, O'Dell proffers only his unsworn statement during trial that "[t]he sexual battery was dropped, Your Honor, by the Court." O'Dell's statement is not sufficient to show an adjudication of the charge. O'Dell filed the record of the proceeding in Florida, but the trial court did not admit it in evidence because O'Dell

failed to have it properly authenticated. Nonetheless, we have reviewed the Florida record and find *no* reference to a dismissal of the attempted rape charge on the merits.

O'Dell argues that evidence of unadjudicated crimes and juvenile findings of not innocent are not admissible in the penalty stage of trial. We adhere to our consistent position that "a trier of fact called upon to decide whether or not to impose the death sentence is entitled to know as much relevant information about the defendant as possible." *Beaver v. Commonwealth*, 232 Va. 521, 529, 352 S.E.2d 342, 347, *cert. denied*, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987) (juvenile offenses and unadjudicated criminal activity held admissible in penalty phase of capital murder case). Accordingly, we reject O'Dell's contentions.

(2) *Convictions More than 10 Years before this Conviction*

O'Dell suggested at trial that Rule 609(b) of the Federal Rules of Evidence precluded the introduction of evidence of convictions more than 10 years before the subject crime. We have no such rule.

O'Dell cites no authority indicating the admission of such prior convictions presents constitutional issues. The only case he cites in support of his proposition is *State v. Beal*, 311 N.C. 555, 565, 319 S.E.2d 557, 563 (1984), which turned on a construction of North Carolina and Alabama statutes, and did not involve the constitutional issue O'Dell raises. There is no merit in this argument.

B

Admission of Evidence of Vileness

O'Dell did not brief his assignment of error dealing with the admission of evidence of the "vileness" of the murder and, therefore, we will not consider it. Rule 5:27(e). He does assign separate error and argue that an instruction on vileness "was fatally duplicitous." We need not rule on this contention because the jury did not base its verdict on the vileness predicate.

C

Exclusion of Mitigating Evidence

O'Dell argues that he was entitled to introduce evidence and to have the jury instructed that in the event he received a life sentence, he would not be eligible for parole. We have rejected similar arguments in our previous capital murder cases, and do so now for the reasons stated in those cases. *See Williams v. Commonwealth*, 234 Va. 168, 179-80, 360 S.E.2d 361, 368 (1987); *Poyner v. Commonwealth*, 229 Va. 401, 432, 329 S.E.2d 815, 836-37, *cert. denied*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 (1985).

D

Instructions on Mitigating Circumstances

O'Dell argues the trial court failed "to give the jury *any* guidance as to the nature and function of mitigating circumstances." O'Dell tendered copies of 22 instructions on mitigation which a defendant proffered in a capital

murder case in the State of Georgia. He also tendered an annotation of eight of Mississippi's model jury instructions drafted for use in the sentencing phase of trial and a North Carolina jury form of interrogatories on mitigation. We find the trial court correctly refused to give these purported instructions because they did not correctly state Virginia law, or they submitted principles of law inapplicable to the facts in this case. The instructions granted sufficiently covered the subject of mitigation.

E

Admission of Hearsay

O'Dell now objects to the postsentence report as "inaccurate hearsay." His objection to the report at trial was limited to the information elicited from his sister, who he said had "no knowledge of it. Anything she says is completely hearsay." Although the trial court afforded O'Dell an opportunity to correct any misstatements in the report, and he did so as to other statements, he never said his sister's statements were "inaccurate," only that they were "completely hearsay." During the sentencing phase of a capital murder case, the court may consider hearsay evidence, favorable or unfavorable to the defendant, contained in a postsentence report. This is implicit from the language of Code § 19.2-264.5 and Code § 19.2-299, which permit a probation officer "to thoroughly investigate and report upon the history of the accused and any other and all other relevant facts."

O'Dell also contends the person who prepared the report was not called as a witness. The record shows that Sandra E. Mann, the probation officer who prepared the

report, did testify, and O'Dell cross-examined her. This is in contrast to the case O'Dell cites, *Gardner v. Florida*, 430 U.S. 349, 356, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977), in which the trial court did not even show the defendant the presentence report, let alone afford him an opportunity to cross-examine the person who prepared it. We reject O'Dell's contentions on this issue.

VI

MISCELLANEOUS ISSUES

A

Restrictions on O'Dell's Right to Defend Himself

O'Dell complains that "Ray's interference in the trial- . . . violated" his right to represent himself. Specifically, he contends it destroyed the jury's perception that O'Dell was representing himself. *See McKaskle v. Wiggins*, 465 U.S. 168, 178, 104 S.Ct. 944, 951, 79 L.Ed.2d 122 (1984).

The trial court told the jury O'Dell was acting as his own attorney, but Ray, as standby counsel, would assist O'Dell. O'Dell cites no instance in the trial in which Ray did not defer to O'Dell's decisions in presenting his defense. In fact, the record reflects Ray deferred to O'Dell in every instance of disagreement. A reading of the entire record convinces us that O'Dell clearly and convincingly projected the image of self-representation to the jury. O'Dell conducted the voir dire examination of 31 of the jurors, and made the opening statement, in which he told the jury he was a *pro se* defendant. O'Dell conducted extensive cross-examination of eight of the Commonwealth's key witnesses, and the direct examination of five

of the witnesses he called to the stand. Additionally, he made many objections before the jury. The record leaves little doubt that O'Dell controlled all vital portions of his defense before the jury and before the court.[10] Ray's involvement was substantially less than that of standby counsel in *McKaskle*, and was well within the reasonable limits the United States Supreme Court articulated in *McKaskle*, 465 U.S. at 178, 104 S.Ct. at 951.

Neither of O'Dell's claims that the trial court erroneously restricted his closing argument in the penalty phase, and would not permit O'Dell to allocute to the jury before sentencing in violation of his constitutional rights have merit. O'Dell is wrong on the facts – the trial court did *not* restrict O'Dell from arguing his innocence in the penalty phase. The trial court merely said O'Dell was confined to arguing the evidence in the record, and could not argue evidence which had not been introduced. Allocution occurs before the court which pronounces the sentence, Code § 19.2-298; the jury does not sentence the defendant, it only "ascertains" the punishment in its verdict, Code § 19.2-295.

Over the Commonwealth's objection, O'Dell argued successfully for Ray's participation in the suppression hearings. The United States Supreme Court pointed out in *McKaskle*, "Once a pro se defendant invites or agrees to any substantial participation by counsel, subsequent

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[10] O'Dell's motions encompass 792 pages of the appendix. Except for a limited number of typed pages, which standby counsel may have prepared, and copies of newspaper clippings, the balance is entirely in O'Dell's handwriting, amply evidencing his unrestricted self-representation.

appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced." 465 U.S. at 183, 104 S.Ct. at 953. Our review of the record fails to disclose *any* objection to Ray's participation thereafter, except O'Dell's contention of Ray's alleged "conflict of interest."

O'Dell now claims Ray's interference denied him the opportunity to make his own closing statement. The trial court ruled that either O'Dell or his counsel, but not both, could make the closing argument. A trial court has broad discretion in the supervision of opening statements and closing argument. *See Jordan v. Taylor*, 209 Va. 43, 51, 161 S.E.2d 790, 795 (1968). We find no abuse of that discretion in limiting the number of persons who could argue on each side in this case.

We find O'Dell's allegations of impermissible restrictions on his right to defend himself to be meritless.

B

Prosecutorial Misconduct

O'Dell complains of prosecutorial misconduct, alleging a number of incidents before, during, and after the trial. We need not discuss each complaint. Some were simply not established by the record. Other alleged incidents O'Dell did not object to, nor did he move for a mistrial or request precautionary instructions at the time, preventing our review at this time. Rule 5:25; *see Blount v. Commonwealth*, 213 Va. 807, 811, 195 S.E.2d 693, 696 (1973). Finally, our review of the entire record convinces

us that those minor deviations from a Commonwealth's Attorney's duty to conduct himself in a proper manner,[11] which O'Dell properly preserved for appeal, were clearly insufficient to deny him a fair trial.

C

"Heightened Reliability" Requirement

O'Dell contends that a so-called "heightened reliability" standard created by the Eighth Amendment to the United States Constitution requires us to reverse his death sentence. We disagree. The standard of proof is beyond a reasonable doubt. There is no heightened reliability standard in a capital murder case. Nor do the cases relied upon by O'Dell support the existence of such a standard.

The only reason O'Dell gave supporting this assignment of error was that "[i]t is undisputed that David Pruett confessed to the crime long before trial." O'Dell does not refer to any supporting testimony in the record, only to his own unsworn statements indicating that he had heard Pruett admitted to his lawyer and minister he had murdered Schartner.

O'Dell had the trial court make arrangements so Pruett could testify, but then later requested the trial court to excuse Pruett. O'Dell attempts to justify his

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[11] One of the Assistant Commonwealth's Attorneys wrote a letter to an expert witness for the defendant *after* the trial was over, criticizing her testimony. We do not approve of such conduct by prosecutors, but the letter was written *after* the trial and, therefore, did not affect the result.

action by claiming Pruett had a Fifth Amendment privilege against self-incrimination. O'Dell ignores the effect of Code § 19.2-270, which would have compelled Pruett to testify. *Cunningham v. Commonwealth*, 2 Va.App. 358, 344 S.E.2d 389 (1986).

O'Dell also erroneously claims a "priest-penitent" privilege justifies his failure to present the testimony of the minister who allegedly heard Pruett's confession of Schartner's murder. Code § 19.2-271.3 creates a "priest-penitent" privilege in criminal cases, but limits the privilege to "information communicated to [the minister] by the accused." O'Dell, not Pruett, is the accused in this case.

We find no merit in this assignment of error.

VII

SENTENCE REVIEW

A

Propriety of Death Sentence

O'Dell claims the jury imposed the sentence of death "under the influence of passion, prejudice or any other arbitrary factor." O'Dell refers to nothing in the record in support of this argument, but Code § 17-110.1(C)(2) requires us to review the record to determine if the jury was so influenced. Our review fails to disclose that the jury was motivated by any of these arbitrary influences in fixing O'Dell's punishment at death.

Code § 17-110.1(C)(2) also requires us to determine whether the death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Our comparison of the records of our prior capital murder decisions, accumulated pursuant to Code § 17-110.1(E), convinces us that the sentence in O'Dell's case is not excessive or disproportionate to penalties imposed in similar cases for the reasons which follow.

The murder of Schartner was brutal. Schartner was strangled to death with a force sufficient to break bones in her neck and leave finger imprints on her neck. She was beaten so severely about the head that eight separate marks were left on her skull. A number of other injuries on her body indicated she attempted to ward off blows from a blunt object. The evidence also showed Schartner had been murdered during the commission of, or subsequent to, her rape.

In considering the defendant, we find a lengthy criminal record. O'Dell, born in 1941, began his criminal career at the age of 13 with a juvenile conviction of breaking and entering. During the next three years, he was convicted five times of auto theft.

In 1958, his career escalated to crimes of violence, with three assault convictions that year, as well as a conviction for threatening bodily harm. The following year, O'Dell was convicted of an attempted escape from the penitentiary. Only five months after his discharge from the penitentiary, O'Dell's probation was revoked. He was convicted of five armed robberies and five unauthorized uses of motor vehicles, and sentenced to

confinement in the penitentiary for 24 years. While he was in the penitentiary, O'Dell was convicted of second degree murder.

After his parole from the penitentiary in July of 1974, O'Dell went to Florida, where he was convicted of a kidnapping and robbery, which occurred in February of 1975. The victim in that case testified as to the details of her robbery and subsequent abduction, as well as O'Dell's assault upon her in an attempted rape. During that assault, she said O'Dell struck her several times on the head with his gun, choked her, and held a cocked gun to her head in his effort to force her to submit to his sexual advances. The Florida court sentenced O'Dell to a 99-year confinement, but in December of 1983 he was released on parole. Fourteen months after that release, Schartner was murdered.

Because the jury based O'Dell's sentence of death upon his "future dangerousness," we give special attention to our prior decisions in which the death penalty was imposed upon a similar finding of probability that a defendant would be a continuing threat to society. *Peterson v. Commonwealth*, 225 Va. 289, 301, 302 S.E.2d 520, 528, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983). This record equals, and in some cases surpasses, the records in a number of cases in which juries have returned verdicts for the death penalty based on "future dangerousness." *Williams*, 234 Va. 168, 360 S.E.2d 361; *Pope*, 234 Va. 114, 360 S.E.2d 352; *Peterson*, 225 Va. 289, 302 S.E.2d 520; *Bassett v. Commonwealth*, 222 Va. 844, 284 S.E.2d 844 (1981), *cert. denied*, 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458 (1982); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

Taking into account both O'Dell and the crime he perpetrated, and comparing his case with similar cases, we find that juries in this jurisdiction generally fix the death penalty for criminal conduct similar to O'Dell's.

VIII

CONCLUSION

Our review of the record discloses no reversible error. Accordingly, we affirm the judgments of the trial court.

Affirmed.

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

At Law No. CL89-1475

CHARLES H. THOMPSON, Warden, Mecklenburg Correctional Center Boydton, Virginia; EDWARD W. MURRAY, Director, Virginia Department of Corrections; MARY SUE TERRY, Attorney General of the Commonwealth of Virginia; and the COMMONWEALTH OF VIRGINIA,

Respondents.

ORDER

This Court, having considered the amended petition for a writ of habeas corpus, the motion and the supplemental motion to dismiss of the respondents, the memorandum and supplemental memorandum in opposition to the motion to dismiss, the response to the petitioner's memorandum and the motions for DNA testing and for a psychological evaluation of the petitioner to both of which the respondents consent, and this Court having taken testimony and heard argument on these matters on August 22, 1989, finds that the following claims in the petition for a writ of habeas corpus will be denied because they were not raised at trial and on appeal in violation of the principles enunciated in *Slayton v. Parrigan*, 215 Va. 27 (1974):

IIA(2). Paragraphs 163 through 165 alleging that the trial court improperly failed to monitor the performance of petitioner acting as his own counsel;

V. Paragraphs 220 through 229 alleging that the aggravating factors of vileness and future dangerousness are unconstitutionally vague;

VI. Paragraphs 230 through 234 alleging that the jury was improperly instructed that it had to be unanimous as to each aggravating factor;

X. Paragraph 263 alleging that the Commonwealth failed to disclose exculpatory statements by David Pruett;

XI. Paragraphs 265 through 271 alleging that a change of venue should have been granted and that the jury should have been sequestered;

XIV. Those parts of paragraphs 281 through 283 alleging that venirepersons Kelly and Thornton were improperly retained;

XVII. Paragraphs 296 through 297 alleging that electrocution is cruel and unusual punishment.

The court finds on the basis of the aforementioned pleadings and proceedings that the following allegations will be denied because they were previously considered by the Supreme Court of Virginia on petitioner's direct appeal. *Hawks v. Cox*, 211 Va. 91 (1970):

I. Paragraphs 136 through 142, alleging that immaterial and irrelevant evidence of an unrelated crime was admitted;

IIA(!). Paragraphs 155 through 157 alleging that the trial court failed to provide appropriate warnings about self-representation to the petitioner;

IIA(1). Paragraph 159 alleging that petitioner's original attorney was improperly permitted to withdraw;

IIA(3). Paragraphs 166 through 168 alleging that the petitioner was denied the resources necessary to represent himself;

III. Paragraphs 179 through 191 alleging that petitioner was improperly refused an opportunity to advise the jury that he would be ineligible for parole;

IVA. Paragraphs 193 through 195 alleging that the court improperly admitted electrophoretic evidence;

IVC. Paragraphs 200 through 203 claiming that tests were not performed with appropriate scientific testing controls;

IVD. Paragraphs 203 through 204 alleging that the Commonwealth failed to preserve evidence;

IVE. Paragraphs 205 through 206 alleging that petitioner was improperly denied ex parte hearings;

IVF. Paragraphs 207 through 210 alleging that the petitioner was improperly denied reciprocal discovery;

IVG. Paragraphs 211 through 213 alleging that the Court improperly refused to limit the number of experts for the Commonwealth;

IVH. Paragraphs 214 through 216 alleging that the petitioner was improperly restricted in his cross-examination of a prosecution witness;

IVI. Paragraphs 217 through 219 claiming that the Court improperly refused to limit the testimony of the petitioner's expert;

VII. Paragraphs 235 through 241 alleging that the penalty phase instructions were constitutionally inadequate:

VIII. Paragraphs 242 through 247 alleging that the Court improperly restricted cross-examination of the witness Watson;

IX. Paragraphs 250 through 255 claiming that the testimony at trial of the witnesses Watson, Craig and Christianson was unreliable;

X. Paragraph 262 alleging that the Commonwealth improperly failed to produce exculpatory evidence with respect to the witness Watson;

XII. Paragraphs 272 through 276 alleging that the trial court improperly advised the jury that its role was to recommend a sentence;

XIII. Paragraphs 277 through 280 claiming that the jury panel was not a valid cross-section of the community;

XIV. Those parts of paragraphs 281 through 285 alleging that venirepersons Thurston, Villandre, and Foust were improperly retained or that venirepersons McClellan, Fiutko, and Jones were improperly excluded from the panel;

XV. Paragraphs 286 through 290 claiming that the *voir dire* questions were improperly slanted towards the death penalty;

XVI. Paragraphs 291 through 295 alleging that improper and unreliable evidence was introduced at the penalty phase;

XIX. Paragraphs 302 through 310 claiming that the Supreme Court improperly applied its procedural rules;

The Court also dismisses, without prejudice, claim XVIII, set forth in paragraphs 298 through 301, which alleges that petitioner is presently insane so that his execution would be unconstitutional because to this point petitioner has not produced any evidence to support that claim.

This Court dismisses claim XX, set forth in paragraphs 310A through 310D, alleging that petitioner was denied effective assistance of counsel on appeal, because the petitioner has failed to demonstrate any prejudice based on the alleged ineffectiveness.

The Court also dismisses paragraphs 176 through 178 of claim IIB alleging that the status and duties of stand-by counsel prevented effective assistance, and that portion of claim IIA which states in paragraph 148(c) that the petitioner's waiver of counsel was constitutionally

invalid because his stand-by counsel was inexperienced, unprepared, and ineffective because petitioner waived his Sixth Amendment right to counsel.

The Court retains that portion of claim II(A)1, set forth in paragraphs 149 through 154 and 160 through 162, and claim II(A)4, set forth in paragraphs 169 through 175, which allege that petitioner's waiver of his right to effective assistance of counsel was invalid, pending psychiatric and neurological evaluation of petitioner, whose transportation to Staunton Correctional Facility on September 29, 1989 and Buckingham Correctional Facility on October 25, 1989 has been ordered by separate orders upon the consent of respondents (Tr. 47, 58).

The Court further retains that portion of claim IX, set forth in paragraph 256, which alleges that on the basis of cumulative error the serological evidence at trial was unreliable pending the performance of the DNA testing ordered by separate order on the consent of the respondents and that portion of claim IV, (IVB), paragraphs 196 through 199, alleging that the trial court improperly found the test performed by Emrich to be reliable.

Discovery relating to competency and DNA may proceed after consultation between counsel (Tr. 100-01). New evidence or discovery to permit new evidence will only be permitted as to these two claims.

The Clerk shall send a copy of this order to counsel for the petitioner and counsel for the respondents.

ENTER: 1/31/90

TJ

JUDGE

I ask for this:

/s/ Illegible
Counsel for Respondents

Seen and objected to:

/s/ Illegible
Counsel for Petitioner

/s/ Illegible
Counsel for Petitioner

/s/ Illegible
Counsel for Petitioner

Certified to be a TRUE COPY of record in my custody. J. Curtis Fruit, Clerk Custodian

BY: /s/ Barbara Illegible
Deputy Clerk

[Caption Omitted In Printing]

ORDER

This Court, having considered the second amended petition for a writ of habeas corpus, the fourth motion to dismiss of the respondents, the memorandum in opposition to that motion to dismiss, and all of the previous pleadings filed herein; and this Court having heard argument on these matters on August 14, 1990, for the reasons set forth in the order of this Court entered on January 31, 1990 and for those additional reasons set forth at the conclusion of the argument on August 14, 1990, dismisses all of the claims in the second amended petition for a writ of habeas corpus with the exception of the following claims which were retained by that order:

> Claims II(B)2 and II(B)4 and IIE, set forth in paragraphs 183-189, 196-198 and 203-209, alleging that petitioner's waiver of counsel was invalid;
>
> Claims IVB and IX, set forth in paragraphs 235-238 and 294, alleging that on the basis of cumulative error the serological evidence produced at trial was unreliable.

The Court, on the basis of the aforementioned pleadings and proceedings, dismisses the following allegations raised for the first time in the second amended petition for the following reasons:

> Claim IIC which alleges that trial counsel was ineffective for failing to ensure a proper evaluation of the petitioner is dismissed because Dr. Kreider was provided with all the materials required by statute and relevant to the inquiry;

Claim XXI is dismissed because no material evidence of perjury beyond that known to petitioner at the time of trial has been produced;

Claim XXII is procedurally barred under *Slayton v. Parrigan*, 215 Va. 27 (1974), since it could have been raised at trial and on appeal and was not;

Claim XXIII is dismissed because Doctor Kreider was qualified to make the sanity and competency evaluations and had available to him all materials relevant to his evaluations.

The claims related thereto having been dismissed, the Court denies the motions for discovery and for a live juror poll.

The Court reserves for a subsequent ruling the motion to enjoin counsel for the respondents from communicating with petitioner's trial counsel until the time set forth for delivery to opposing parties of all documents and the names of witnesses to be used at the evidentiary hearing.

For the reasons set forth in his memoranda in opposition to Respondents' first and fourth motions to dismiss, Petitioner objects to those rulings dismissing any part of his petition for a writ of habeas corpus, and to those rulings denying his various motions relating to this petition.

The Clerk shall send a copy of this order to counsel for the petitioner and counsel for the respondents.

Enter this 1st day of Oct., 1990

/s/ Illegible
Judge

Seen and objected to in part:

/s/ Illegible
Counsel for Respondents

Seen and objected to in part:

/s/ Illegible
Counsel for Petitioner

Certified to be a TRUE COPY on record in my custody. J. Curtis Fruit, Clerk
Custodian

BY: /s/ Barbara Illegible
Deputy Clerk

[Caption Omitted In Printing]

ORDER

This proceeding came on to be heard on October 23, 1990, upon the Second Amended Petition For a Writ of Habeas Corpus and the fourth Motion to Dismiss, the Petitioner appearing in person and by his attorneys, Robert S. Smith, John P. Coffey, John R. Quinn, and Andrew R. Sebok, and the Respondent appearing by Eugene Murphy and Linwood T. Wells, Jr., Assistant Attorneys General.

This Court having heretofore dismissed all allegations in Petitioner's Second Amended Petition except Claims II(B)2, II(B)4, and II(E), set forth in paragraphs 183-189, 196-198, and 203-209, alleging that Petitioner's waiver of counsel was invalid, and Claims IV(B) and IX, set forth in paragraphs 235-238 and 294, alleging that on the basis of cumulative error the serological evidence produced at trial was unreliable, after hearing the evidence of the parties and the argument of counsel, doth [sic] find for the reasons given at the conclusion of the hearing from the bench that Claims II(B)2, II(B)4, II(E), IV(B) and IX should be dismissed and the Petitioner is not entitled to the relief sought.

For the foregoing reasons, the Court is of the opinion that the Second Amended Petition For A Writ Of Habeas Corpus be, and is hereby denied and dismissed, it is, therefore,

ADJUDGED AND ORDERED that the Second Amended Petition For A Writ Of Habeas Corpus be, and

is hereby, denied and dismissed, to which action of the Court Petitioner notes his exceptions.

The Clerk is directed to forward a certified copy of this order to the Petitioner, the Petitioner's counsel, Robert S. Smith, John P. Coffey, John R. Quinn, and Andrew R. Sebok, the Respondent, Linwood T. Wells, Jr., and Eugene Murphy, Assistants Attorney General.

Entered this 26th day of November, 1990.

/s/ Illegible
Judge

We object to this:

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By: /s/ Illegible

/s/ Andrew R. Sebok
Andrew R. Sebok
Counsel for Petitioner

We ask for this:

/s/ Eugene Murphy
Eugene Murphy
Assistant Attorney General

/s/ Linwood T. Wells, Jr.
Linwood T. Wells, Jr.
Assistant Attorney General

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 1st *day of* April, 1991.

Joseph Roger O'Dell, III, Appellant,

against

Charles E. Thompson, Warden, Mecklenburg Correctional Center, et al., Appellees.

From the Circuit Court of the City of Virginia Beach

On March 8, 1991 came the appellant, by counsel, and filed a motion for an order allowing him to perfect his appeal in this case, and a memorandum in support of that motion.

Thereupon came the appellees, by the Attorney General of Virginia, and filed a response in opposition to said motion.

On consideration whereof, the appellant's motion is denied.

A copy,

Teste:

/s/ Illegible
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 1st *day of* April, 1991.

Joseph Roger O'Dell, III, Appellant,

against

Charles E. Thompson, Warden, Mecklenburg Correctional Center, et al., Appellees.

From the Circuit Court of the City of Virginia Beach

Finding that the appeal was not perfected in the manner provided by law, the Court rejects the petition for appeal in the above-styled case. Rule 5:17(a)(1).

A copy,

Teste:

/s/ Illegible
Clerk

Supreme Court of the
United States

91-5655

JOSEPH R. O'DELL

v.

THOMPSON, WARDEN, ET AL.

Certiorari denied.

Opinion of JUSTICE BLACKMUN, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, respecting the denial of the petition for writ of certiorari.

This is a capital case. Since the present Term began on October 7, 1991, the Court has considered 102 capital petitions, each seeking review of a decision of a State's highest court. Even if practical considerations did not preclude review on the merits of all such petitions, another consideration often argues against granting certiorari: In many of these cases, a federal habeas proceeding is necessary to develop further the petitioner's claims, both factually and legally. This is one such case. Because I believe the evidence raises serious questions about whether petitioner was guilty of the charged crime or was capable of representing himself, I write to underscore the importance of affording petitioner meaningful federal habeas review.

On February 5, 1985, a woman was murdered in a field behind the After Midnight Club in Virginia Beach, Va. Petitioner O'Dell had been at that bar during the evening. There was no evidence that he previously had known the woman or that they had spoken or departed

together. O'Dell left the bar some time after the victim did and went to another bar where he got into a fight. The following day, O'Dell arrived at his former girlfriend's house. Thereafter, the former girlfriend found bloodstained clothing in her garage and turned it over to the police. O'Dell was charged with murder.

Shortly before the trial, the court excused O'Dell's public defender because of an unspecified conflict. A new attorney was appointed, but O'Dell sought permission to proceed *pro se* after the attorney acquiesced in the Commonwealth's motion to have O'Dell examined by a court-appointed psychiatrist.[1] Following his examination by a local psychiatrist, the court found O'Dell competent to proceed *pro se* and ordered the attorney to act as standby counsel. Several times during the trial, the judge commented on O'Dell's inability to "emotionally control" himself, see, *e.g.*, 22 Tr. 44, and on one occasion informed O'Dell that his outbursts "concern me as to whether you are in fact in need of a reevaluation." 23 Tr. 21. Despite entreaties by standby counsel, the court refused to order a reevaluation.

The Commonwealth's evidence at trial consisted of tire tracks that were "similar" to those left by petitioner's car, blood tests, and testimony by a fellow inmate that O'Dell had confessed to committing the murder. The court refused O'Dell's request for a hearing on the reliability of the blood tests and allowed the technician to opine that the blood samples taken from O'Dell's shirt

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[1] O'Dell previously had been diagnosed as a paranoid schizophrenic and had engaged in erratic behavior prior to trial.

and jacket were consistent with samples taken from the victim. The court also denied O'Dell's proffer of evidence that the informant had offered to manufacture evidence in other trials as a means of avoiding prison terms.[2] O'Dell was convicted and sentenced to death. The conviction and sentence were upheld on appeal.

O'Dell continued to maintain his innocence during state habeas proceedings. He introduced the results of DNA testing that demonstrated that the blood found on his shirt either was not the victim's or could not reliably be linked to the victim. O'Dell also argued that the trial court erred in allowing him to represent himself, given his history of mental illness and his behavior at trial. See *Faretta v. California*, 422 U.S. 806 (1975); *Drope v. Missouri*, 420 U.S. 162, 181 (1975). The Virginia Circuit Court denied state habeas relief, specifically holding that the fact that current testing methods would have produced a different result does not justify the issuance of a writ of habeas corpus. The state court also ruled that O'Dell had been competent to represent himself.[3]

---

[2] Subsequent to O'Dell's trial, the informant was given three years' probation on a breaking and entering charge, despite contrary assurances by the prosecution to petitioner's counsel and the court.

[3] Petitioner raised a number of other substantial federal claims, including a challenge to remarks made in the prosecutor's closing argument that petitioner previously had violated his parole. Standby counsel had complained to the trial court that the argument was made in such a way as to convince the jury that it had only two options: either sentence petitioner to death or turn him loose on the streets to kill again. In fact, petitioner could receive only the death sentence or life without parole. The trial court refused petitioner's request for a curative

Following the denial of state habeas relief by the Virginia Circuit Court, O'Dell filed a timely notice of appeal with the Virginia Supreme Court. Having interpreted the relevant subsection of the Virginia Code as providing for an appeal as a right, O'Dell's counsel then filed timely assignments of error.[4] On March 6, 1991, a week after the filing deadline, the Deputy Clerk of the Virginia Supreme Court and the attorney for the Commonwealth informed petitioner's counsel that, in their opinion, O'Dell did not have an appeal as of right and thus O'Dell also needed to file a petition for appeal. At the same time, the Commonwealth's attorney allegedly informed petitioner's counsel that he would not oppose O'Dell's supplementation of his filings with the additional document. Two days later, however, when O'Dell filed a motion to perfect his appeal, the Commonwealth

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instruction or a chance to rebut the prosecutor's misleading statements. In his state habeas proceedings, petitioner argued that the trial court had violated *Gardner v. Florida*, 430 U.S. 349 (1977), which held that a defendant is denied due process of law when his death sentence is imposed, at least in part, on the basis of information that he had no opportunity to deny or explain. The Virginia Circuit Court held that this challenge was barred by res judicata under *Hawks v. Cox*, 211 Va. 91, 175 S. E. 2d 271 (1970).

[4] A Virginia statute provides that a habeas decision in a capital case is appealable directly to the Virginia Supreme Court. See Va. Code Ann. § 17-116.05:1(B) (1988); *Hill v. Commonwealth*, 8 Va. App. 60, 69, 379 S. E. 2d 134, 139 (1989). The wording of this statute – "appeals lie directly to the Supreme Court" – suggests an appeal as of right, rather than a discretionary petition for appeal. The other categories of cases listed in this subsection require the filing of assignments of error, not a petition for appeal.

opposed the motion. On March 15, O'Dell filed his petition for appeal. On April 1, the Virginia Supreme Court denied O'Dell's motion and rejected his appeal. The Commonwealth now argues that the Virginia Supreme Court's rejection of O'Dell's appeal bars review of the merits of the federal questions raised by O'Dell in the Commonwealth's courts.

The Virginia Supreme Court's dismissal of O'Dell's habeas petition should not deprive a federal habeas court of jurisdiction. Under *Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985), the Virginia Supreme Court's rejection may not be based on an independent state ground because *Tharp v. Commonwealth*, 211 Va. 1, 175 S. E. 2d 277 (1970), requires the Virginia Supreme Court to consider whether a constitutional right was abridged before denying an extension of time for filing a petition for appeal.[5] The Virginia Supreme Court's rejection of O'Dell's appeal may also be an inadequate state ground. In *James v. Kentucky*, 466 U.S. 341 (1984), this Court held that only firmly established state procedural rules interpose a bar to the adjudication of federal constitutional claims. The ambiguity of the Virginia statute, Va. Code Ann. § 17-116.05:1B (1988), as

[5] While this Court rejected a similar argument in *Coleman v. Thompson*, 501 U.S. 722, 742 (1991), this case may be distinguishable. *Coleman* dealt with an untimely *notice* of appeal, not an untimely *petition* for appeal. Since the notice and assignments were timely, the Commonwealth was not unaware of petitioner's arguments, as it arguably was in *Coleman*. The Commonwealth's initial willingness to extend petitioner's time to perfect his appeal provides additional evidence that Virginia can waive the untimeliness rule when fundamental constitutional issues are at stake.

to whether capital appeals are discretionary or as of right may preclude its use as a procedural bar.[6] See also *Ford v. Georgia*, 498 U.S. 411 (1991) (state practice must be firmly established and regularly followed in order to prevent subsequent review by this Court); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964) (application of procedural rule was pointless, severe, and consequently inadequate as jurisdictional bar to review).

Finally, federal review of O'Dell's claims is possible if it is necessary to prevent a fundamental miscarriage of justice, see *Coleman v. Thompson*, 501 U.S. 722, 757 (1991), or if the constitutional violation caused the conviction of an innocent person. See *McCleskey v. Zant*, 499 U.S. 467, 502 (1991).

In short, there are serious questions as to whether O'Dell committed the crime or was capable of representing himself – questions rendered all the more serious by the fact that O'Dell's life depends upon their answers. Because of the gross injustice that would result if an innocent man were sentenced to death, O'Dell's substantial federal claims can, and should, receive careful consideration from the federal court with habeas corpus jurisdiction over the case.

[6] As has been noted, see n. 4, *supra*, the wording of this statute – "appeals lie directly to the Supreme Court" – suggests an appeal as of right, rather than a discretionary petition for appeal. According to petitioner's counsel, even the Clerk's office and the Commonwealth's attorney were uncertain as to whether petitioner was entitled to an appeal as of right.

No. 96-6867

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

J.D. NETHERLAND, Warden, Mecklenburg Correctional Center; RONALD J. ANGELONE, Director, Virginia Department of Corrections: JAMES S. GILMORE, III, Attorney General of the Commonwealth of Virginia; COMMONWEALTH OF VIRGINIA,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

JOINT APPENDIX
VOLUME II, PAGES 138-346

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Petition For Certiorari Filed November 26, 1996
Certiorari Granted December 19, 1996

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

JOSEPH ROGER O'DELL, III, Petitioner,	)	
v.	)	Civil Action No. 3:92CV480
CHARLES E. THOMPSON, *et al.*, Respondents,	)	(Filed Sep. 6, 1994)

MEMORANDUM OPINION

THIS MATTER comes before the Court on a Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, and respondents' motion to dismiss and/or for summary judgment.[1] For the reasons stated herein, the petition will be GRANTED.

---

[1] Although the respondents filed a motion to dismiss, the Court has considered the exhibits, affidavits, transcripts and state court records. Under Rule 8(a) of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"), if the district court determines that a hearing is not required, then "the judge shall make such disposition of the petition as justice shall require." Habeas Rules 8(a); *see Maynard v. Dixon*, 943 F.2d 407, 412-13 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1211 (1992). Because discovery is unnecessary in this case, the respondents' motion will be treated as a motion for summary judgment. *See Maynard*, 943 F.2d at 412-13; *see also* Fed. R. Civ. P. 12(b) ("If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . ").

I. PROCEDURAL HISTORY

On March 28, 1985, Joseph Roger O'Dell, was indicted for capital murder, abduction, rape and sodomy. O'Dell pled not guilty to all charges. His case was heard by a jury before the Circuit Court for the City of Virginia Beach, Judge H. Calvin Spain presiding.

The trial commenced with jury selection on August 11, 1986. The jury rendered its verdict of guilty on September 10, 1986. The next day the jury fixed O'Dell's sentence at death. The trial judge pronounced the sentence of death on November 13, 1986.

O'Dell is to be put to death by electrocution. No execution date has been set.

O'Dell appealed his conviction and death sentence to the Supreme Court of Virginia, which affirmed the judgment of the Circuit Court. *O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491 (1988). O'Dell timely petitioned for rehearing. On April 1, 1988, the Virginia Supreme Court decided an issue on rehearing that it had erroneously held to be procedurally barred and again affirmed the conviction. *O'Dell v. Commonwealth*, Record No. 861219, slip op. (Va. April 1, 1988). The United States Supreme Court denied O'Dell certiorari to hear the appeal. *O'Dell v. Virginia*, 488 U.S. 871 (1988). O'Dell's motion for rehearing on his petition for certiorari was also denied. *O'Dell v. Virginia*, 488 U.S. 977 (1988).

O'Dell filed a Petition for a Writ of Habeas Corpus in the Circuit Court of the City of Virginia Beach on June 1, 1989. On January 31, 1990, Judge Spain dismissed the

majority of the claims raised in the First Amended Petition without an evidentiary hearing.

With leave of the court, petitioner filed a Second Amended Petition for a Writ of Habeas Corpus on July 3, 1990. the action was transferred to Judge Austin E. Owen, who dismissed the majority of the claims in the Second Amended Petition without an evidentiary hearing. Judge Owen dismissed the remainder of the Second Amended Petition on November 26, 1990, after an evidentiary hearing limited to O'Dell's competency and forensic claims.

O'Dell appealed the dismissal of his state habeas petition. The Virginia Supreme Court dismissed that appeal on April 1, 1991, because O'Dell filed a Notice of Appeal and Assignments of Error rather than a Petition for Appeal. Subsequently, the Virginia Supreme court denied a motion for reargument and petition for rehearing. The United States Supreme Court denied O'Dell's Petition for a Writ of Certiorari on December 2, 1991. Justice Blackmun, along with Justices Stevens and O'Connor, issued a statement respecting the denial of certiorari that stated: "Because I believe the evidence raises serious questions about whether petitioner was guilty of the charged crime or was capable of representing himself, I write to underscore the importance of affording petitioner meaningful federal habeas review." *O'Dell v. Thompson*, 112 S. Ct. 618 (1991).

O'Dell filed a Petition for a Writ of Habeas Corpus in this Court on July 23, 1992.

II. FACTUAL BACKGROUND

On September 10, 1986, Joseph Roger O'Dell, III, after proceeding *pro se* through a six-week trial, was convicted of murdering Helen Schartner.

The details of the crime for which O'Dell was convicted are contained in the Supreme Court of Virginia's opinion on direct review, *O'Dell v. Commonwealth,* 364 S.E.2d 491, 495-96 (Va. 1988), and are recounted briefly below.

On Tuesday, February 5, 1985, 44-year-old Helen Schartner left the County Line Lounge night club in Virginia Beach at about 11:30 p.m. O'Dell left the club sometime between 11:30 p.m. and 11:45 p.m. About two and a half hours later, O'Dell entered a convenience store with blood on his face and hands, in his hair, and on his clothes.

At about 3:00 p.m. on Feb. 6, Schartner's body was discovered in a field behind another club, across the highway from the County Line Lounge. She had been killed by manual strangulation. She also had several wounds on her head caused by blows from a handgun. These head wounds had produced extensive bleeding.

Police discovered tire tracks consistent with the tires on O'Dell's car in an area near Schartner's body.

O'Dell slept at the house of a former girlfriend, Connie Craig, for most of the day after the murder. After reading a local newspaper's account of Schartner's death, Craig found blood-stained clothing in her garage and called police. Thereafter, O'Dell was charged with murder.

Forensic evidence introduced at O'Dell's trial purportedly established that dried blood on O'Dell's shirt and jacket was the same type as Schartner's. That evidence also purported to establish the presence of semen in the victim's vagina and anus containing enzymes consistent with those in O'Dell's seminal fluid. During his incarceration, O'Dell told Steven Watson, a fellow inmate, that he had strangled Schartner after she refused to have sexual intercourse with him.

As discussed below, DNA testing of O'Dell's shirt, performed after he had completed direct appeals, revealed that the blood on that article of clothing could not have come from Schartner.

III. CLAIMS

O'Dell offers 23 claims in support of his petition that his conviction and death sentence were imposed in violation of the United States Constitution. They are as follows:

I. Petitioner was denied his constitutional right to effective assistance of counsel.

- Ia. He was not competent to represent himself at trial.
- Ib. There was no constitutionally valid waiver of his right to counsel.
- Ibi. A qualified psychiatrist was not appointed to assist him.
- Ibii. His competency "evaluation" was constitutionally insufficient.

Ibiii. His purported waiver of his right to counsel was not knowing.

Ibiv. His waiver of the right was involuntary.

Ic. Stand-by counsel failed to ensure a proper evaluation.

Id. The trial court failed to monitor his competence to continue *pro se*.

Ie. He was incompetent to represent himself at the penalty phase of his trial.

If. He was denied the resources necessary to represent himself.

Ig. Stand-by counsel was unable to render effective assistance.

Ih. O'Dell suffered prejudice from the ineffective assistance.

II. The government thwarted his ability to challenge the scientific evidence.

IIa. The Trial court erred in admitting electrophoretic evidence.

IIb. The Commonwealth failed to show the reliability of the test performed by one of the Commonwealth's witnesses, Emrich.

IIc. Emrich's technique in performing the scientific testing fell below the applicable standard of care.

IId. The Commonwealth's failure to preserve evidence for retesting violated due process.

IIe. The trial court improperly denied him an *ex parte* hearing in which to make his preliminary showing of need for funds.

IIf. The trial court failed to provide reciprocal discovery.

IIg. The trial court refused to limit the Commonwealth's number of experts.

IIh. The trial court improperly restricted his cross-examination of Dr. Sensabaugh.

IIi. The trial court refused to limit Dr. Guth's testimony to those portions of his report dealing with serology.

IIj. The DNA test results show the prior evidence was inaccurate.

III. The jury was wrongfully precluded from considering mitigating evidence of petitioner's ineligibility for parole.

IV. The petitioner was prejudiced by the admission of immaterial and irrelevant evidence of an unrelated crime.

v. O'Dell's death sentence is unconstitutional because it was based upon aggravating factors that failed to adequately guide the sentencer's discretion.

Va. Virginia's "vileness" aggravating factor is unconstitutionally vague as applied.

Vb. Virginia's "future dangerousness" aggravating factor is unconstitutionally vague as applied.

VI. The trial court failed properly to instruct the jury that it had to be unanimous as to each aggravating factor.

VII. The trial court's penalty phase instructions were constitutionally inadequate.

VIII. Petitioner was denied his Sixth Amendment right to confront and effectively cross-examine Steven Watson.

IX. Petitioner's conviction and sentence were based on constitutionally insufficient and patently unreliable evidence.

X. The Commonwealth failed to produce exculpatory evidence of a confession to the murder by David Pruett and a plea agreement with Steven Watson.

XI. The Court failed to ensure that O'Dell's verdict and sentence would be rendered by an impartial jury unprejudiced by extraneous influences.

XIa. A change of venue should have been granted.

XIb. The jury should have been sequestered.

XII. Repeated statements that the jurors' role was to "recommend" the sentence violated both Virginia and federal law.

XIII. His constitutional right to a representative cross-section of the community in the venire was violated.

XIV. The wrongful retention of biased jurors and the wrongful exclusion of qualified jurors violated O'Dell's rights.

XIVa. Jurors Thurston, Foust, Villandre, and Kelly were wrongfully retained.

XIVb. Certain venire persons were wrongfully excluded.

XV. *Voir dire* questions to eliminate those with scruples against the death penalty were more fairly developed than questions to detect prejudice in favor of the death penalty.

XVI. During the penalty phase, the jury was permitted to consider unreliable or irrelevant evidence.

XVII. O'Dell's conviction was obtained through the use of perjured testimony.

XVIII. The Commonwealth failed to establish the chain of custody of evidence introduced at trial.

XIX. O'Dell was denied his constitutional right to effective assistance of appellate counsel.

XX. By arbitrarily applying procedural rules to bar consideration of direct appeal of constitutional infirmities in O'Dell's trial, the Supreme Court of Virginia evaded its fundamental obligation to ensure the death penalty was not unconstitutionally applied in this case.

XXI. The Virginia courts unconstitutionally denied O'Dell a full and fair adjudication of his state habeas corpus petition in violation of the Fourteenth Amendment.

XXII. Electrocution is cruel and unusual punishment.

XXIII. O'Dell's death sentence may not be carried out because he has never been adequately evaluated as free of mental illness.

IV. EXHAUSTION and PROCEDURAL DEFAULT

Respondents state that Claim Ibiii, all of the claims under point II, III, IV, VII, VIII, IX, part of Claim X, all of claims XII, XIII, XIV, XV, part of XVI, and all of Claim XX were raised by the petition in his direct appeal to the Virginia Supreme Court. Thus, the Commonwealth concedes that petitioner has exhausted his available state remedies as to these claims and that they should be reviewed on the merits.

The remainder of petitioner's claims, argues the Commonwealth, were raised for the first time in O'Dell's state habeas corpus petition. Thereafter, O'Dell did not perfect an appeal to the Virginia Supreme Court from the adverse decision he received in the state habeas court. Consequently, respondents aver that the majority of petitioner's claims are procedurally barred. Since no appeal was perfected from the order denying petitioner's state habeas petition, and the Virginia Supreme Court dismissed the appeal on procedural default grounds, the Commonwealth contends that those claims raised for the

first time in state habeas are barred from federal collateral review. *See Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546 (1991); *Teague v. Lane*, 489 U.S. 288 (1989). The claims allegedly barred are: Ia, Ibi, Ibii, Ibiv, Ic, Id, Ie, Ig, V, VI, X (with respect to the claim of failure to disclose a statement of David Pruett), XI, XVII, XVIII, XX, XXII and XXIII. Furthermore, respondents aver that several of these claims are additionally barred because the habeas court expressly found that they had been ripe for presentation on direct appeal. (*See* Pet. App. I, Exhs, 4-5.) Under Virginia law, trial errors which can be but are not raised on direct appeal may not be raised in habeas corpus proceedings. *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975). Such claims are also barred on federal habeas. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). Those claims additionally barred under *Slayton v. Parrigan* and *Wainwright v. Sykes* are: Id, IIh,[2] IV, V, VI, X, XI, XVIII and XXII.

In response to respondents' claim that some of petitioner's grounds for relief are procedurally barred, O'Dell argues that the Virginia Supreme Court's refusal to review the denial of habeas relief is not an adequate and independent state ground sufficient to bar this Court from reviewing O'Dell's claims because (1) under its own precedent, the Virginia Supreme Court necessarily considered O'Dell's federal claims; (2) the ambiguity of Virginia's rules for appeals in capital habeas cases, and the Virginia Supreme Court's application of these rules, precludes their operation as a bar to O'Dell's claims; and (3)

---

[2] This claim and Claim IV were not considered on direct appeal because contemporaneous objections were not made at trial under Virginia Supreme Court Rule 5:25.

this Court must exercise jurisdiction to prevent a fundamental miscarriage of justice.

After receiving an adverse decision on his state habeas petition in the Circuit Court of the City of Virginia Beach, O'Dell filed a Notice of Appeal. Thereafter, within the prescribed time, petitioner filed "Assignments of Error" in the Virginia Supreme court. However, as later determined by the Virginia Supreme Court, O'Dell should have filed a "Petition for Appeal." O'Dell did not become aware of this potential problem until after the time for filing such petition had expired.[3]

---

[3] O'Dell's counsel states in an affidavit appended to petitioner's Memorandum in Opposition that an assistant state attorney general and the deputy chief clerk of the Virginia Supreme Court notified him on March 6, 1991, that, in their view, the "Assignments of Error" document was in an improper format because state law required a "Petition for Appeal." O'Dell's counsel stated that the state assistant attorney general:

> told me during our telephone conversation on March 6, 1991 that he had no objection to such supplementation and would not oppose an application to have this Court approve such supplementation. . . . Mr. O'Dell moved [the Virginia Supreme Court] on March 8, 1991 for an Order allowing him to use the filings of the "Assignments of Errors" and the "Petition for Appeal" to perfect his appeal. The office of the Attorney General subsequently repudiated the assurance given to me by Assistant Attorney General [Eugene] Murphy and presented to [the Virginia Supreme court] its opposition to Mr. O'Dell's application. The Attorney General does not deny, however, that Assistant Attorney General Murphy gave me the assurances described above.

(Affidavit of Steven Fasman, ¶¶ 12-13.)

O'Dell then filed a motion in the Virginia Supreme Court in an attempt to perfect his appeal. The court dismissed his motion.

O'Dell's [sic] argues that the Virginia Supreme Court actually considered his federal claims before dismissing his habeas appeal. In a one-page order dated April 1, 1991, the Virginia Supreme Court stated that O'Dell had filed "a motion for an order allowing him to perfect his appeal in this case, and a memorandum in support of that motion." (Pet. App. I, Exh. 7, at 1.) The court denied that motion, and then issued a second order the same day rejecting the petition for appeal because "the appeal was not perfected in the manner provided by law . . . " (*Id.* at 2.)

There is no adequate and independent state ground when a state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Coleman*, 111 S. Ct. at 2557 (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)). The language of the Virginia Supreme Court's decision did not fairly appear to rest primarily on federal law or to be interwoven with federal law. The court expressly relied on O'Dell's failure to perfect his appeal in dismissing the case. *See id.* Therefore, the Virginia Supreme Court's dismissal of O'Dell's appeal of the state habeas court decision rested on an adequate and independent state procedural ground. *See Coleman*, 111 S. Ct. at 2556-57; *cf. Nickerson v. Lee*, 971 F.2d 1125, 1128-29 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1289 (1993) (distinguishing *Coleman* when meaning of state

court decision could not be determined in combination with the pleadings).

O'Dell's [sic] next contends that the ambiguity of Virginia's procedural rules for effectuating appeals in capital habeas cases precludes their operation as a bar to his claims. The petitioner contends that the confusion, among all parties, as to the correct form of the appeal from the denial of habeas relief, demonstrates that the Virginia rules failed to give appropriate notice to litigants. Moreover, O'Dell argues that the words of the statute – "appeals lie directly to the Supreme Court" – suggest an appeal as of right, rather than a discretionary petition for appeal. Va. Code § 17-116.05:1. Thus, O'Dell contends that the dismissal is rendered ineffective as an adequate state procedural bar. *See James v. Kentucky*, 466 U.S. 341, 348-49 (1984) (only firmly established and regularly followed state procedural rules interpose a bar to the adjudication of federal constitutional claims); *Ford v. Georgia*, 498 U.S. 411, 111 S. Ct. 850 (1991).

Although this argument was rejected by the Virginia Supreme Court, this Court has come to the opposite conclusion. The ambiguity of the Virginia procedural rules on appeals of state habeas decisions is aptly illustrated by the language of the relevant statutes. First, Virginia Code section 17-110.1 states: "A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court." Va. Code § 17-110.1(A). Subsection B of that provision directs that the circuit court proceedings be transcribed expeditiously and forwarded to the Supreme Court within 10 days after it is filed. Va. Code

§ 17-110.1(B).[4] Thus, O'Dell's counsel reasonably concluded that Va. Code § 17-110.1 provided for mandatory review of all death sentences.

Next, Va. Code § 17-116.05:1 states:

> In accordance with other applicable provisions of law, appeals lie directly to the Supreme Court from a conviction in which a sentence of death is imposed, from a final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus, from any final finding, decision, order or judgment of the State Corporation commission, and from proceedings under §§ 54.1-3935 and 54.1-3937.

Va. Code § 17-116.05:1.[5] This statute indicates that the same procedural rules that apply to appeals of convictions in death penalty cases also apply to appeals from decisions of circuit courts involving habeas corpus petitions.

Virginia Supreme Court rule 5:17(a) requires that a "petition for appeal" be filed with the clerk "in every case in which the appellate jurisdiction of [the Virginia Supreme Court] is invoked . . . " within three months after entry of the trial court order. Va. Sup. Ct. Rule 5:17(a)(1). However, Virginia Supreme Court Rule 5:22

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[4] The transcripts were filed as required by Rule 5:11. (*See* Fasman Aff. at ¶ 7.)

[5] The portion of this statute relating to habeas petitions was added in 1985. Prior to that amendment, appeals from the state habeas court went to the state court of appeals as of right. *See Titcomb v. Wyant*, 323 S.E.2d 800 (Va. 1984).

The types of appeals referenced in Va. Code § 17-116.05:1(B) other than habeas appeals were also appeals of right.

purports to make a special rule applicable to cases in which death sentences are imposed. It states:

> (a) Upon receipt of a record pursuant to § 17.110.1 B, the clerk of this Court shall notify in writing counsel for the accused in the circuit court (who shall be deemed to be counsel for the appellant), the Attorney General (who shall be deemed to be counsel for the appellee), and the Director of the Department of Corrections of the date of its receipt (the Filing Date). The case shall thereupon stand matured as if an appeal had been awarded to review the conviction and the sentence of death, and the notice issued by the clerk, of this Court shall be deemed to be the certificate of the clerk of this Court pursuant to Rule 5:23 that an appeal has been awarded, and the enforcement of the sentence of death shall thereby be stayed pending the final determination of the case by this Court.
>
> (b) Within 10 days after the Filing Date, counsel for the appellant shall file with the clerk of this Court assignments of error upon which he intends to rely for reversal of the conviction or review of the sentence of death. He shall accompany the assignments of error with a designation of the parts of the record relevant to the review and to the assignments of error. Not more than 10 days after such assignments of error and designation are filed, counsel for the appellee may file with the clerk of this Court a designation of the additional parts of the record that he wishes included as germane to the review or to any assignments of error. Counsel for the appellant shall include in the appendix the parts so designated. . . .

> (c) With respect to the sentence of death, it shall be a sufficient assignment of error to state that the sentence was imposed under the influence of passion, prejudice, or other arbitrary factor or that the sentence is excessive or disproportionate to the penalty imposed in similar cases.
>
> (d) Except to the extent that a conflict with this Rule may arise (and this Rule shall then be controlling) further proceedings in this case shall conform to the Rules relating to cases in which an appeal has been perfected.
>
> (e) This Court may, on motion in a particular case, vary the procedure prescribed by this Rule in order to attain the ends of justice and the purpose of § 17-110.1.

Va. Sup. Ct. Rule 5:22.

These rules are ambiguous on the procedure for appeals from the denial of state habeas decisions. Virginia Supreme Court Rule 5:22 refers to Virginia Code section 17.110.1(B), which makes no clear distinction between direct appeals and habeas appeals. In light of the circumstances existing at the time, O'Dell's counsel reasonably concluded that the broadly worded exception for capital cases in Rule 5:22 also applied to appeals from the denial of post-conviction relief. State law did not give fair notice that the "petitions for appeal" referenced in Rule 5:17 were required for state habeas appeals rather than the "assignments of error" allowed in Rule 5:22. Once a state has provided for an appeal, the procedures governing

those appeals and the state's application of those procedures in individual cases must comply with due process. In O'Dell's case,[6] the requirement of filing a "petition for appeal" in lieu of "assignments of error" was not "firmly established and regularly followed." *See James*, 466 U.S. at 348-49 (Kentucky's distinction between "admonitions" to the jury and "instructions" to the jury not firmly established and regularly followed).

"Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Id.* at 349 (quoting Justice Holmes in *Davis v. Wechsler*, 263 U.S. 22, 24 (1923)); *see also Ford*, 111 S. Ct. at 857 (state procedural rules must be timely established and give fair notice to litigants). Therefore, the claims O'Dell raised for the first time in the state habeas court are not barred by the reasoning in *Coleman*,[7] because the

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[6] More than three years have passed since the dismissal of O'Dell's state habeas appeal. The Court obviously makes no determination here whether the requirement of filing "petitions" for appeal from the denial of state habeas review has become firmly established and regularly followed since the disposition of O'Dell's appeal in 1991.

[7] *Coleman* is factually inapposite to O'Dell's petition. In *Coleman*, the Court rejected the petitioner's contention that *Ake* applied to the Virginia Supreme Court's dismissal of his appeal for failure to file a timely notice of appeal. Its rationale does not apply here. In this case a timely notice was filed, along with the identification of assignments of error. Whereas Coleman "[did] not contend that the failure of the Virginia Supreme Court to hear his untimely state habeas appeal violated one of his constitutional rights," *Coleman*, 111 S. Ct. at 2560-61, O'Dell

state procedural rule requiring petitions for appeal to be filed instead of assignments of error cannot constitute an "adequate and independent state ground" for the state court's ruling. *See James*, 466 U.S. at 348-49; *Ford*, 111 S. Ct. at 857; *see also O'Dell v. Thompson*, 112 S. Ct. 618, 619-20 (1991) (Statement of Justices Blackmun, Stevens and O'Connor).

Having concluded that *Coleman* should not bar the consideration of claims Ia, Ibi, Ibii, Ibiv, Ic, Id, Ie, Ig, V, VI, X (with respect to the claim of failure to disclose a statement of David Pruett), XI, XVII, XVIII, XX, XXII and XXIII of O'Dell's federal habeas petition, the next question is whether any of his remaining arguments are sufficiently meritorious to excuse the procedural default of claims Id, IIh, IV, V, VI, X, XI, XVIII and XXII under *Wainwright v. Sykes*, which prevents federal court consideration of claims which could have been raised an earlier stage of the process but were not.

In conjunction with O'Dell's argument that the Virginia Supreme Court's refusal to review the denial of habeas relief is not an adequate and independent state ground, O'Dell asserts that this Court must exercise jurisdiction over all claims raised in his federal habeas petition to prevent a fundamental miscarriage of justice. *See McCleskey v. Zant*, 499 U.S. 467, ___, 111 S. Ct. 1454, 1474 (1991). O'Dell contends that his petition raises substantial claims of innocence, and, therefore, a hearing on the

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makes exactly that argument. Moreover, unlike the notice of appeal, a petition for appeal is not a "purely ministerial document." *Id.* at 2561.

merits is necessary to evaluate these claims. The discussion of O'Dell's actual innocence claim will appear in Part V.

Petitioner's second argument in response to the Commonwealth's assertion that some claims are procedurally barred under *Wainwright v. Sykes*, 433 U.S. 72 (1977), is that this Court may hear claims that were not presented on direct appeal. O'Dell states that even in a proper case of procedural default, federal review is mandated if there is cause for the default and prejudice thereby. *See Murray v. Carrier*, 477 U.S. 478 (1986). Petitioner further avers that cause includes "a showing that the factual or legal basis for a claim was not reasonably available to counsel [or] that the procedural default was the result of constitutionally ineffective assistance of counsel." *Whitley v. Bair*, 802 F.2d 1487, 1504 (4th Cir. 1986) (citing *Murray v. Carrier*, 477 U.S. 478 (1986)), *cert. denied*, 480 U.S. 951 (1987).

O'Dell argues that he has asserted numerous bases for his ineffective assistance of appellate counsel claim (i.e. appellate counsel's (1) failure to investigate adequately a possible *Brady* violation; (2) failure to renew a chain of custody argument concerning clothing introduced as evidence against O'Dell, which was first raised in O'Dell's motion to overturn the verdict; (3) inability to recognize other issues raised in the federal habeas corpus petition). Furthermore, O'Dell argues that constitutional standards of ineffective assistance of counsel cannot be meaningfully applied without a hearing.

Petitioner contends that any failure to present on appeal the other claims for relief which the Commonwealth asserts are barred by *Sykes* stems directly from

this ineffective assistance of appellate counsel. Thus, O'Dell argues that he has asserted cause for any purported procedural default under *Sykes*. *See Orazio v. Dugger*, 876 F.2d 1508, 1511 (11th Cir. 1989) (counsel's failure to raise claim on direct appeal constitutes ineffective assistance and cause for procedural default).

O'Dell also avers that he has sufficiently alleged prejudice resulting from appellate counsel's ineffective assistance. The Petition contends that appellate counsel failed to comply with Virginia procedural rules, and that other claims were ineffectively briefed. (*See* Pet. ¶¶ 362-63.)

In response to O'Dell's argument that he has demonstrated cause and prejudice, the Commonwealth asserts that, having failed to raise the issue of ineffective assistance of counsel on appeal in the state courts from the denial of habeas relief, O'Dell has procedurally defaulted, barring consideration of such claim as being cause under *Wainwright v. Sykes*. *See Justus v. Murray*, 897 F.2d 709, 711-714 (4th Cir. 1990).

In *Justus v. Murray*, the Fourth Circuit stated that *Murray v. Carrier*, 477 U.S. 478 (1986), stands for the proposition that "before an ineffective assistance of counsel claim may be raised as cause in federal habeas, it must first be exhausted in state court and not be procedurally defaulted." *Justus*, 897 F.2d at 714. In this case, O'Dell raised his claim of ineffective assistance of counsel in his state habeas corpus petition, and his failure to perfect an appeal to the Virginia Supreme Court cannot constitute a procedural default if those rules were not "firmly established and regularly followed" under *James*. Thus, *Justus* should be distinguished from this case.

However, the inquiry does not end there. "[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland v. Washington,* 466 U.S. 668, 691 (1984). The only prejudice alleged by O'Dell is that his appellate counsel inadequately briefed some claims, and failed to comply with Virginia procedural rules. (Pet. ¶ 362-63.) O'Dell has not identified what claims the Virginia Supreme Court refused to consider because of his counsel's failure to comply with procedural rules. In addition, he has not identified what claims were "inadequately briefed," nor what could be added to make the briefing adequate. These boilerplate allegations of prejudice are insufficient to warrant a hearing on the claims barred by *Slayton* and *Sykes.* Accordingly, claims Id, IIh, IV, V, VI, X, XI, XVIII and XXII will not be considered on the merits.

V. ACTUAL INNOCENCE and PROCEDURAL DEFAULT

Under current law, actual innocence is not a separate constitutional claim. Instead, it is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins,* 113 S. Ct. 853, 862 (1993). Under the authority of *Sawyer v. Whitley,* 112 S. Ct. 2514 (1992), the petitioner argues that any procedural bar should not apply to his case because deoxyribonucleic

acid (DNA) tests show that he is innocent.[8]

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[8] The second question before this Court is whether O'Dell's factual innocence claim has merit.

The state habeas judge ruled this way:

> The court is of the opinion that the serological evidence produced at trial was not flawed, that it was in accordance with recognized standards in existence at the time; and while it may be that current testing methods would have produced a different result, that . . . does not justify the issuance of a writ of habeas corpus.

(Pet. Appendix II, p. 263.)

In *Herrera v. Collins,* the Supreme Court discussed the possibility that such a claim would be recognized, but only in rare circumstances would it succeed. The Court stated:

> We may assume, for sake of argument in decided this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often state evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.

Id. at 869.

Although the Court did not explain what it meant by 'extraordinarily high" or "truly persuasive demonstration," by implication such standards would involve proof beyond the clear and convincing standard recognized in *Sawyer.* The DNA evidence introduced at O'Dell's federal evidentiary hearing did not surpass this standard, *see Spencer v. Murray,* 5 F.3d 758 (4th Cir. 1993) (articles attacking accuracy of DNA testing insufficient to meet factual innocence threshold), nor did O'Dell's evidence establish that "no

The Court held an evidentiary hearing on O'Dell's innocence claims on August 2, 1994. At this hearing, O'Dell was permitted an opportunity to show that DNA evidence developed after his trial establishes that he is innocent of the crime such that otherwise procedurally defaulted claims should be reviewed on the merits.

The Fourth Circuit has adopted the *Sawyer v. Whitley* test for considering actual innocence claims.[9] *See Spencer v. Murray*, 18 F.3d at 236. Under *Sawyer*, to have a defaulted claim reviewed, a petitioner must prove "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the

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rational trier of fact could [find] proof of guilt beyond a reasonable doubt," *See Herrera*, 113 S. Ct. at 875 (White, J., concurring) (citing *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)).

[9] This Court cited *Sawyer v. Whitley*, 505 U.S. ___, 112 S. Ct. 2514 (1992), in the Order scheduling the hearing. Thereafter, the petitioner filed a Pre-Hearing Memorandum which stated:

> Although the Court's Order of July 5, 1994 cited *Sawyer v. Whitley*, 112 S.Ct. 2514 (1992) as supplying the standard for determining the "actual innocence" claim of this case, in that case the petitioner did not challenge his guilt of the underlying crime, but asserted that he was "innocent of the death penalty." Here, in contrast to *Sawyer*, Petitioner asserts a claim of actual innocence of the crime itself. Accordingly, Petitioner submits that the standard set forth in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), governs this case.

(Pre-Hearing Mem. at 5.)

The Fourth Circuit has rejected this argument, holding that the *Sawyer* standard also applies to guilt-phase errors. *Spencer v. Murray*, 18 F.3d 229, 236 (4th Cir. 1994).

petitioner eligible for the death penalty under the applicable state law." *Spencer*, 18 F.3d at 236 (citing *Sawyer*, 112 S. Ct. at 2515).

The alleged constitutional error in this case is that the petitioner's conviction was based on constitutionally unreliable electrophoretic enzyme test results of blood-stained clothing recovered from Connie Craig's house. As explained in Part VIII of this Opinion, O'Dell has failed to demonstrate that the evidence was constitutionally unreliable. Moreover, this allegation is similar to the innocence claim attempted – and rejected – by the Fourth Circuit in *Spencer v. Murray*, 5 F.3d 758 (4th Cir. 1993).

In that *Spencer* opinion, the petitioner argued that "because of the alleged errors in the testing process his DNA results were flawed and he is 'actually innocent.' " *Id.* at 765. The court of appeals determined this argument "boils down to an assertion that the DNA results were flawed and [Spencer] was wrongly convicted. This is a claim of factual innocence. The errors he points to – potential errors in the results of the DNA test – are errors of fact, not law." *Id.* at 765.

Although the *Spencer* decision presents a sufficient legal basis to refuse to consider O'Dell's claim of "actual" innocence, the Court will, nevertheless, discuss the fair probability that the eletrophoretic test results of blood-stains used against O'Dell were erroneous.[10] The reason for this discussion is that the Statement of three Justices

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[10] As explained below, the Court expressly holds that O'Dell's evidence fails the controlling *Herrera* standard, but would meet a "fair probability" standard. *Cf. Kuhlmann v. Wilson*, 477 U.S. 436, 455 n.17 (1986), *with Sawyer v. Whitley*, 112 S. Ct. at 2515 and *Spencer v. Murray*, 18 F.3d at 236.

of the United States Supreme Court indicates that that Court envisioned a complete inquiry into the merit of O'Dell's DNA evidence.

> Even if practical considerations did not preclude review on the merits of all such petitions, another consideration often argues against granting certiorari: in many of these cases, a federal habeas proceeding is necessary to develop further the petitioner's claims, both factually and legally. This is one such case. Because I believe the evidence raises serious questions about whether petitioner was guilty of the charged crime or was capable of representing himself, I write to underscore the importance of affording petitioner meaningful federal habeas review.

O'Dell v. Thompson, 112 S. Ct. 618 (1991) (Statement of Justice Blackmun, Stevens and O'Connor respecting the denial of certiorari). In light of the concerns expressed by this Statement, the Court will discuss the evidence introduced on August 2, 1994, at the federal evidentiary hearing on O'Dell's innocence claims.

A. O'Dell's Experts[11]

Dr. John Edward Spence is a medical geneticist for the Clinical Genetics Laboratory at Carolinas Medical Center in Charlotte, North Carolina. The respondents stipulated to his qualifications in the general area of DNA

[11] O'Dell's case in chief consisted solely of the transcribed testimony of three experts, Dr. John Edward Spence, Dr. Scott Diehl, and Dr. Richard A. Guerrieri, who testified at the evidentiary hearing ordered by the state habeas court.

testing. (Hab. Tr. 74.)[12] Dr. Spence described the type of DNA testing performed on bloodstains from the shirt and jacket found by Connie Craig after the murder. The technique is referred to generally as restriction fragment length polymorphism (RFLP), or, more specifically, as Southern Blot Analysis.[13]

[12] By the time of the federal evidentiary hearing, Dr. Spence had testified 14 to 15 times in the area of DNA testing, all but two of which were on behalf of the prosecution.

[13] This technique, which was performed by LifeCodes Corporation, involves:

1. Breaking open the cell with reagents to isolate the nuclei. Enzymes digest proteins around the DNA to isolate it into a liquid solution.

2. A restriction enzyme is applied to cut the DNA into small pieces.

3. The DNA fragments are loaded onto a gel made of agarose. An electrical field is applied across the gel to make the DNA, which has a negative charge, move to the positive charge. This is called electrophoresis. The smaller fragments travel farther in the gel, which causes the fragments to line up in an array.

4. The DNA is denatured from double to single strands.

5. Salt solutions transfer the DNA to a membrane made of nylon, which overlays the gel.

6. A DNA probe (a piece of DNA previously isolated with known characteristics) is introduced. It is single stranded and has a radioactive "label" allowing it to be tracked.

7. DNA on the membrane is put into a hybridization solution with the probe. The probe will attach only where it matches.

8. All excess reductivity is washed off, along with all incomplete matches. The filtering membrane with the probe attached is then laid against a piece of X-ray film.

9. The probe, being radioactive, will cause an exposure on the X-ray film (an "autoradiograph"). "Bands" or "hybridization points" will show up on the X-ray where the probe is attached.

From an examination of the autoradiographs ("autorads") produced by LifeCodes Corporation, Dr. Spence concluded that the DNA from the bloodstained shirt and DNA from the victim could be "excluded" as having a common origin. (App. II at 83.) Dr. Spence then examined DNA test results from the victim and the bloodstained jacket. He testified that the bands on the jacket sample are "consistently higher than the bands on the victim sample . . . they are not exactly the same position compared to the markers flanking them." (*Id.* at 84-85.) Based on that observation, he determined that the DNA comparison of the bloodstained jacket and the victim yielded an "inconclusive" result. (*Id.* at 87.)

On cross-examination, the Commonwealth explored the possibility that the difference in band positions on some of the autorads could be explained by a phenomenon described as "band shifts," which can occur from degradation of the sample through environmental factors or from the age of the sample. (*Id.* at 85-87.) Dr. Spence conceded that bands do not have to match positions exactly before they can be considered as having a common origin. However, he testified that "in my experience, this is more variation than is typically allowed for ban positions. . . . " (*Id.* at 86.)

This allows the laboratory to determine whether a "match" has occurred.

See Appendix II, 58-72; *RFLP DNA Analysis* (LifeCodes Corporation videotape), submitted as background material by joint agreement of the parties; *See generally United States v. Young*, 754 F. Supp. 739, 740-41 (D. S.D. 1990).

Dr. Scott Diehl is an Assistant Professor of Psychiatry and Human Genetics. He was accepted as an expert in DNA electrophoretic testing, polymorphic protein testing, and population distributions. Diehl testified that he had "considerable reason to be concered" about the reliability of polymorphic enzyme tests performed by Commonwealth expert Jacqueline Emrich, which was crucial evidence at O'Dell's trial. (App. II at 107.) Among other problems, he testified that:

1. The lab notes failed to disclose when the analysis was performed, and did not contain a signature indicating who had performed the work. (*Id.* at 108.)

2. The materials disclosed a high test failure rate. (*Id.* at 108-109.)

3. The lab notes were "incomprehensible," making it virtually impossible for outside experts to review. (*Id.* at 109-110, 117.)

Based on the enzyme tests, Emrich had concluded that blood on O'Dell's checkered shirt was "consistent with blood from Helen Schartner and different from Joseph O'Dell." (Tr. 48B:39-40.) Dr. Diehl testified that the more reliable DNA test results, which established that the victim's blood did not match the blood on the shirt, "validated" his concern about the reliability of the enzyme test results introduced at trial. (App. II at 116.)

Commonwealth expert Dr. Richard A. Guerrieri was employed by the Commonwealth of Virginia in the Tidewater Regional Crime Laboratory's Forensic Science Division. Dr. Guerrieri was an [sic] employed as a forensic serologist specializing in DNA analysis. (*Id.* at 202, 208.)

Dr. Guerrieri confirmed Dr. Spence's conclusions with regard to the DNA test results. He testified that (a) the victim could be excluded as a source of the blood on the shirt, and (b) the DNA test results of the blood on the jacket sample was "inconclusive." (*Id.* at 234.) However, because the band shift of the blood on the jacket was within the state crime laboratory's normal limit of 2.5 percent, he testified that the jacket sample could not exculpate O'Dell.

> The sample on the right, which I believe was from the jacket, to my – I've seen a pattern that is similar to the victim's blood; however, I don't use this particular probe; and based on that overall pattern, I would term that inconclusive.
>
> So I am not eliminating, nor am I including, the victim as a source on that particular stain. My interpretation is it's inconclusive, and I would refer the interested parties to Lifecodes for their interpretation.

(*Id.* at 241.)

B. Commonwealth's Expert

At the federal evidentiary hearing, Jeffrey D. Ban testified on behalf of the Commonwealth. Ban is employed by the state crime laboratory's forensic science division. He was accepted as an expert in DNA analysis.[14] (Hab. Tr. at 12.) He also reviewed the autorads of

[14] Ben testified that he has worked on behalf of the government for most of his career, and that he has never testified on behalf of the defense. (Hab. Tr. at 35.)

the blood samples from the shirt, jacket, victim and O'Dell produced by LifeCodes Corporation.

Ban testified that each individual laboratory sets standards for the allowable amount of band shift that many occur before a test is determined to be inconclusive (the "match criteria"). Ban stated that the state crime laboratory set its match criteria at 2.5 percent. (Hab. Tr. at 20.) LifeCodes Corporation's match criteria was 1.8 percent in 1990. (*Id.*)

Applying the state crime lab's match criteria of 2.5 percent to LifeCodes' report, Ban concluded that the DNA on the jacket sample was "consistent" with the victim's DNA. (Hab. Tr. at 30, 41.) However, the bands from the jacket sample were outside the LifeCodes match criteria of 1.8 percent. (Hab. Tr. at 43.)[15]

Ban acknowledged that, by applying the state crime lab's match criteria to the LifeCodes report, he did not follow the recommendations of the National Research Counsel (NRC). That organization, which is a body of the National Academy of Sciences, appointed a committee to make a report on DNA technology in forensic science. The committee's report, which was issued in 1992, recommends that each lab determine its own match criteria. (Hab. Tr. at 50.) Ban explained his analysis of LifeCodes' report in this manner: "[I]n the NRC report, it refers to if a sample falls outside of match criteria, you should not

[15] Ban testified on recross-examination that when probes fall inside the match window and others fall outside the match window, the proper procedure is to declare the results "inconclusive." (Hab. Tr. 69.) He did not explain why he labeled this results "consistent" in his earlier testimony.

classify it as a match; you should classify it as inconclusive. This has not fallen outside of my criteria, so I have not classified it as inconclusive." (*Id.*)

This testimony prompted the following dialogue with the Court:

Q. Now, another lab, going through similar experimentation, could possibly come up with a different match criteria because it is a different lab, different personnel, different conditions.

BAN: That's correct.

Q: All right. Now, it would be fair to say that each lab who ran these experiments and came up with a match criteria, one lab's match criteria is as valid as another lab's match criteria; is that correct?

BAN: Yes, that's correct.

(Hab. Tr. at 71.)

Ban also testified that LifeCodes attempted to use a monomorphic probe to correct for band shifting in the jacket sample. Although using a monomorphic probe to detect band-shifting is an accepted technique among DNA experts, the NRC report recommends against using monomorphic probes to correct for band shifting:

> Little has been published on the nature of band shifting, on the number of monomorphic internal control bands needed for reliable correction, and on the accuracy and reproducibility of measurements made with such correction. For the present, several laboratories have decided against attempting quantitative corrections; samples that lie outside the match criterion because of apparent band shifting are declared

> to be "inconclusive." The committee urges further study of the problems associated with band shifting. Until testing laboratories have published adequate studies on the accuracy and reliability of such corrections, we recommend that they adopt the policy of declaring samples that show apparent band shifting to be "inconclusive."

Committee on DNA Technology in Forensic Science, National Research Council, *DNA Technology in Forensic Science* 61 (1992). LifeCodes' report stated that although the bands in one of the jacket samples fell outside its match criteria of 1.8 percent, the laboratory nevertheless corrected for band shifting, apparently by using a monomorphic probe. (*See* Hab. Tr. at 108.)

C. O'Dell's Expert Testimony in Rebuttal

On rebuttal at the federal evidentiary hearing, O'Dell again offered Dr. Spence as an expert. Dr. Spence testified that the state crime lab should not have substituted its match criteria of 2.5 percent in place of LifeCodes' match criteria of 1.8 percent. In response to questioning from the Court, Dr. Spence testified that substituting match criteria is an illegitimate method of analyzing autorads:

> The laboratory sets up their standards. They have certain people there doing that testing. They are using certain systems, certain enzyme systems, agents, biological reagents that are specific to that laboratory. The overall protocols are very similar. The general principles are the same. The specifics of how they are applied, the specific reagents they use, the equipment they

> use, their electrophoresis procedure, hybridization procedure all needs to be specific to that laboratory. There are some little subtle differences that can occur. I think if one laboratory sets up their criteria, the results of that laboratory should be analyzed through that criteria and not taken by other criteria . . .

(Hab. Tr. at 75.)

Dr. Spence agreed with the NRC report that using monomorphic probes is not a scientifically reliable method of correcting for band shifting. (Hab. Tr. at 88-89.)

D. Conclusions

Based on the evidence at the evidentiary hearing, the blood on the jacket and the blood on the checkered shirt can be excluded as having a common origin. Again, based on the evidence, the DNA comparison of the blood on the checkered shirt and the victim's blood yielded a result that is "inconclusive."

In addition, while the use of monomorphic probes to correct for band shifting is controversial, *see People v. Keene*, 591 N.Y.S.2d 733 (N.Y. Sup. Ct. 1992), O'Dell has established that the Commonwealth's expert should not have substituted LifeCodes' match criteria of 1.8 percent with the state crime lab's match criteria of 2.5 percent.

Despite this testimony, O'Dell has not proven factual innocence.[16] Based on the circumstantial evidence introduced at trial, and on the confession O'Dell made to jail

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[16] Nor has O'Dell proved that the trial court's acceptance of Emrich's testimony violated his right to fundamental fairness.

house informant Steven Watson,[17] has not proved beyond clear and convincing evidence that he is factually innocent of the crime of murdering Helen Schartner.[18] *See Herrera*, 113 S. Ct. at 869 (setting an "extraordinarily high" threshold and requiring a "truly persuasive demonstration").

VI. FEDERAL COLLATERAL REVIEW

The Commonwealth avers that petitioner is seeking federal collateral review of a presumptively valid state court judgment – a judgment that has withstood both direct and collateral review – and is merely asking this Court to reach different legal conclusions from those reached by the state courts based upon the same factual

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(*See, supra*, Part VII.) Thus, there was no predicate constitutional violation to justify applying the *Sawyer* actual innocence standard. *See Spencer v. Murray*, 5 F.3d at 765.

[17] As stated later in this Opinion, the Virginia Supreme Court's finding that no plea agreement existed between Watson and the Commonwealth must be presumed correct, and O'Dell's new evidence does not indicate that he could rebut this finding by convincing evidence. (*See, supra*, Part XII, Claim X.)

[18] O'Dell also failed to establish that "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt." *See Herrera*, 113 S. Ct. at 875 (White, J., concurring) (citing *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)).

Although O'Dell evidence did establish a "fair probability" that, in light of all probative evidence available at the time of his federal evidentiary hearing, "the trier of the facts would have entertained a reasonable doubt of his guilt," *see Kuhlmann v. Wilson*, 477 U.S. at 454 n.17, this does not entitle him to federal habeas relief on his factual innocence claim, *see Herrera*, 113 S. Ct. at 869; *Spencer*, 5 F.3d at 765.

record. Thus, for this reason, respondents contend that all of O'Dell's claims are barred under the "reasonableness" standard of review articulated by the Supreme Court. *See Wright v. West*, 112 S. Ct. 2482, 2490 n.8 (1992) (Opinion of Thomas, J.) (federal habeas relief is barred "whenever the state courts have interpreted old precedents reasonably, not only when they have done so 'properly' "); *Butler v. McKellar*, 494 U.S. 407, 110 S. Ct. 1212 (1990). Respondents assert that a federal habeas court must "validate reasonable, good-faith interpretations of existing precedents made by state courts," and a state court decision is "reasonable" unless acceptance of the prisoner's claim was "compelled" or "dictated" by existing precedent. *Butler*, 110 S. Ct. at 1217. The Commonwealth contends that none of the claims raised in O'Dell's federal habeas petition were dictated by precedent, nor are they compelled by current law.

The petitioner disputes the Commonwealth's reading of *Wright v. West*. O'Dell asserts that *Wright* does not establish a new, deferential standard of review of state court decisions. O'Dell states that the Commonwealth's reliance on the plurality opinion is misplaced, in that at least four justices rejected Justice Thomas' analysis of *Teague*, while the remaining two justices did not reach the question. Thus, O'Dell contends that this proposed standard does not command the force of law and cannot bind this Court. O'Dell maintains that *Teague* is the applicable standard.

Respondents counter that while a majority of the Court in *Wright* did not endorse the "reasonableness" standard of review, at the same time it refused to endorse its previous adherence to a standard of *de novo* habeas

review with respect to issues involving mixed constitutional questions. Therefore, the Commonwealth argues that, at the very least, *Wright* erodes the notion that *de novo* standard of review is applicable to cases involving mixed questions of law and fact.

Both sides have valid arguments with respect to the Supreme Court's holding in *Wright*. However, because the Supreme Court was unable to agree on a new standard, the Fourth Circuit's decision on this issue is binding. In *Wright*, the Fourth Circuit relied on *Jackson v. Virginia*, 443 U.S. 307 (1979), which required the federal habeas court to review the petitioner's claims *de novo*. *See Wright v. West*, 931 F.2d 262, (4th Cir. 1991), *rev'd on other grounds*, 112 S. Ct. 2482 (1992); *see also Hawkins v. Murray*, 798 F. Supp. 330, 334 n.10 (E.D. Va. 1992) (Fourth Circuit rule remains *de novo* review). Therefore, this Court must review petitioner's federal claims *de novo*.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

The first ground for relief asserted in the petition is that O'Dell was denied his Sixth Amendment right to the effective assistance of counsel. In support of his claim, O'Dell argues that he was not competent to represent himself at trial, that the trial court failed to appoint a qualified psychiatrist to evaluate him, and that the competency evaluation was constitutionally insufficient. (Hab. Pet. Ia, Ibi, Ibii.) In addition, he claims that his purported waiver of his right to counsel was not knowing and voluntary. (Hab. Pet. Ibiii, Ibiv.)

Deciding whether a defendant is competent involves factual determinations in which the findings of state courts are presumed correct. *See Adams v. Aiken*, 965 F.2d 1306, 1313 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2966 (1993). The state habeas court concluded that even if the court-appointed psychiatrist's evaluation was deficient, the record disclosed no prejudice resulting from that failure because even a proper evaluation would not have revealed that the defendant was incompetent to waive counsel. Secondly, Judge Owen ruled that the Supreme Court cases do not require a competency evaluation by the trial court before that court determines the defendant has made a knowing and intelligent waiver. Finally, the habeas court concluded that the psychological evaluation was sufficient, and that it was only one of the many factors considered by the trial court in concluding that O'Dell competently waived his right to counsel. (Appendix vol. II at 244-45.)

In *Godinez v. Moran*, 113 S. Ct. 2680 (1993), the Supreme Court held that the standard for determining whether a defendant is competent to stand trial is the same standard for deciding whether the defendant is competent to waive his right to counsel. Once a trial judge determines that a defendant is competent to stand trial, the judge must then determine that the defendant's waiver is "knowing and voluntary." *Id.* at 2687. The Court cautioned that "as in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence." *Id.* at 2688 n.13.

In an Order issued October 24, 1985, (Appeal vol. I, No. 74), the trial court appointed a psychiatrist, Dr. Stanley J. Kreider, to evaluate O'Dell's competency. The evaluation occurred on October 29, 1985. Dr. Kreider stated that he evaluated O'Dell "specifically with regard to his mental state at the time of the commission of the alleged offenses, and to determine his competency to understand the nature of the proceedings against him and to assist counsel in preparation of his defense." (App. I, Exh. 12.) The doctor determined:

> There was no evidence of any psychiatric illness either at the time of the alleged offenses or at the present time. In addition the patient is considered competent to understand the charges against him, to assist counsel in the preparation of his defense, and to make a voluntary and intelligent decision to waive his right to counsel and prepare his own defense.

(*Id.*)

O'Dell argues that Dr. Kreider, the court-appointed psychiatrist, was unqualified to determine if O'Dell was competent to represent himself because he had no formal training in forensic psychiatry and had never conducted an evaluation to determine whether a defendant was competent to waive counsel. O'Dell further argues that Dr. Kreider was unfamiliar with the relevant state evaluation statutes, and was not qualified under Virginia law to conduct forensic evaluations in criminal cases. *See* Va. Code Ann. §§ 19.2-169.1(a), -169.5(a) (1990 Rep. Vol.).

The Court in *Ake v. Oklahoma*, 470 U.S. 68 (1985), held that a criminal defendant must be provided with access to a competent psychiatrist to assist in his defense when the

defendant's mental state is at issue. *Ake* required merely a competent psychiatrist to conduct "an appropriate examination," but did not specifically require a forensic psychiatrist. Although Dr. Krieder's admitted lack of training in forensic psychiatry might have undermined his credibility with respect to O'Dell's competency, the psychiatrist was familiar with the legal standard for determining when a defendant is competent to stand trial. (*See* App. II at 125-127, 166-67.)

O'Dell's direct examination of Dr. Krieder at the state habeas hearing attempted to show that the psychiatrist was unfamiliar with the legal standard for competency to waive counsel. However, the Supreme Court's holding in *Godinez* renders O'Dell's attempt futile. The standard for competency to stand trial is the same as the standard to waive counsel. *See Godinez*, 113 S. Ct. at 2687. Because Dr. Kreider was familiar with the former, he was – by definition – familiar with the latter.

The next question concerns whether O'Dell's waiver of his right to counsel was knowing and voluntary. O'Dell's first attorney, William Burnside, left the Public Defender's Office and was replaced by Peter Legler shortly after the first preliminary hearing was held on April 29, 1985. (Tr. 1:2-6.) Legler represented O'Dell for about four months. On August 15, 1985, however, Legler moved to withdraw as counsel, citing a conflict of interest. (Tr. 1:2-7.) The court granted Legler's motion without requiring details about the conflict.

> I'm assuming from the comments made by Mr. Legler that this is one of the two matters as to which he made reference yesterday without the specifics of the matters in indicating to the

> Court that he thought that there existed a likelihood that his representation of the interests of one client for whom his office had been appointed might well be adverse to the interests of another client . . . as to whom his office had been appointed and asked my advice as to whether he should seek outside assistance in determining whether in fact there did exist an ethical problem . . .
>
> * * *
>
> He has apparently, judging by his motion, determined that in his opinion his continued representation of this client would not only adversely affect the interests of the client but would place him in a position where he might violate the canons relative to the conduct of attorneys.
>
> * * *
>
> It would seem to me then that any attempt to disclose the details of the possible conflicts relating to these parties could not but serve to affect adversely the interests of at least one and perhaps both of those parties as to whom he has been assigned; and under those circumstances I cannot see any necessity for requiring any further disclosure.
>
> The Office of the Public Defender is appointed in this city to represent perhaps ninety-seven to ninety-eight percent of all those [who need court-appointed counsel], and obviously conflicts will arise from time to time.
>
> It has been the experience of this Court that the occasions where the Public Defender has felt

> it necessary to ask to be relieved from representation have been relatively rare under the circumstances, and the Court has every reason to believe then that that office is fairly exercising its discretion when it believes that there is in fact a conflict or potential conflict.
>
> Obviously counsel should not be compelled to continue in a situation where it believes that its further participation will be a violation of the canons of ethics and obviously also the interests of the defendant would be unfairly prejudiced under such a circumstance.

(Tr. 1:6-8.)

Under *Faretta v. California*, 422 U.S. 806, 835 (1975), a waiver of a right to counsel must be "knowing and intelligent." *Id.* The *Faretta* Court stated:

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

Id.

In contrast to other circuits, the Fourth Circuit "requires no particular form of interrogation." *United States v. Gallop*, 838 F.2d 105, 110 (4th Cir.), *cert. denied*, 487 U.S. 1211 (1988). However, the Fourth Circuit has stated that:

> "[a]t a minimum [the trial court] should, before permitting an accused to waive his right to counsel, explain the charges and the possible

> punishments. . . . " The district judges also should "develop on the record the educational background, age and general capabilities of an accused, so that the ability of an accused to grasp, understand and decide is fully known" to the trial court and fully disclosed by the record. The failure to do so however, would not automatically render the proceedings unconstitutional.

Id. (citations omitted) (quoting *Aiken v. United States*, 296 F.2d 604, 607 (4th Cir. 1961) and *Townes v. United States*, 371 F.2d 930, 934 (4th Cir. 1966), *cert. denied*, 387 U.S. 947 (1967)).

The transcript of the hearings of October 17, and December 2, 10, and 18 of 1985, demonstrates that the trial judge complied with the minimum requirements of *Gallop*. Although he did not expressly state on the record the charges and the possible punishments, it is apparent that the defendant was aware of the nature of the proceedings and understood it could result in a death sentence. He was also warned about the handicaps of being held in jail, the difficulty of examining hostile witnesses, the limited role of standby counsel and the trial judge, and the fact that a lawyer might not be re-appointed if he changed his mind. (*See* Tr. 4-12A.)

Because O'Dell indicated at the time his desire for Legler to remain as counsel and his willingness to waive any conflict of interest, he maintains that the trial court violated his right to waive the conflict. After the court appointed Paul Ray, a solo practitioner who had never handled a capital case, to represent him, O'Dell maintains that he believed he had no choice but to proceed *pro se*

after the trial court denied his motions for alternative counsel.

Although a criminal defendant has the right to waive his right to conflict-free counsel, *see United States v. Duklewski*, 567 F.2d 255 (4th Cir. 1977), that right is not absolute. In *Wheat v. United States*, 486 U.S. 153 (1988), the Supreme Court ruled that trial courts "must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." *Id.* at 163. Although *Wheat* dealt with a decision of a federal district court in California, its rationale applies equally to state court cases in Virginia. The Virginia Code of Professional Responsibility places limitations on the right of clients to waive conflicts of interest. DR 5-105(C); *see Wheat*, 486 U.S. at 160 (California Bar Association rules governing attorneys limited multiple representation).

O'Dell alleges Legler represented another capital defendant, David Pruett, who allegedly confessed to the Schartner murder. This fact, if true, created an actual conflict of interest between Pruett and O'Dell that Legler could not tolerate despite O'Dell's proffered waiver. "Not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation." *Wheat*, 486 U.S. at 160.

After the Court appointed Paul Ray as new counsel, O'Dell repeatedly sought to have Ray replaced. O'Dell

claims he was convinced that he could not be acquitted if he accepted Ray's representation. Thus, he believed he had "no choice" but to proceed *pro se*, and that, therefore, his waiver of the right to counsel was not voluntary.

Illustrative of the weakness of O'Dell's argument is the following discussion with the trial judge:

> THE COURT: All right. Mr. O'Dell, I'm not going to go into a long examination of you on all of this with respect to your motion. You've made two motions before. I pointed out to you repeatedly that you're not a lawyer, that you may have considerable legal knowledge, and you certainly have an adept writing ability.
>
> You've been found to be sane. You have been found to be capable of assisting in your defense and/or proceeding pro se to defend yourself after psychiatric examination. So I don't think we need to go through all of the rocks and rapids that we have been through before.
>
> Now, you have made a motion to go pro se. I want you to state again for the record that it's your desire you want to go pro se.
>
> O'DELL: Yes, sir, it is.
>
> THE COURT: And do you recognize that you're in jail and that the likelihood of you being let out on bond prior to, pending this trial to prepare your defense is somewhere between zero and never?
>
> O'DELL: Yes, sir, I realize that.
>
> THE COURT: And you realize that is going to have some handicap on your ability to prepare for trial?

O'DELL: Yes, sir, I realize that.

THE COURT: All right. And you recall all of the admonishments I have given you before as to what the problems are and the difficulties you may have in examining hostile witnesses who are the prime prosecution witnesses against you?

O'DELL: Yes, I do.

THE COURT: And notwithstanding all those pitfalls, you're willing to take that risk and proceed on your own?

O'DELL: Well, Your Honor, I don't have any choice. It's not being done anyway.

THE COURT: Mr. O'Dell, I'll be happy to hear you on those particular points of what is not being done, but I'll tell you this. From everything I've seen, since Mr. Ray was appointed in this case, he's done everything in his power to get those material things that should be heard before the Court for a hearing, and I've absolutely no evidence whatsoever that this man hasn't done an outstanding job for you at this point or that there is any credibility whatsoever in the allegations which you have made with respect to him. None whatsoever. . . . [19]

(Tr. 9:4-6.)

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[19] O'Dell voiced concern that Ray refused to file several motions O'Dell had prepared on his own behalf. (Tr. 9:6-8.) The judge appropriately noted that an attorney has a duty to refrain from filing frivolous motions, even at the behest of his client. (*Id.*).

More than six months later, on July 1, 1986, O'Dell's irrational fears concerning Ray had not abated:

> O'DELL: Well, Your Honor, with all due respect to Mr. Ray, I know he is a – he is a fine lawyer, Your Honor. We have had too many ups and too many downs, and there is no way that I can accept Mr. Ray back in this case. Even if I have to go to the electric chair, that's just the way I feel about it, and it looks like that's where I'm headed; but . . . I didn't ask for Mr. Ray to get completely out of the case. I asked for the Court to appoint additional counsel and Mr. Ray to be lead counsel, and the Court wouldn't do it, and I just feel that although Mr. Ray worked hard, he tried. I just don't believe he can handle this case. . . .

(Tr. 25:47.)

It is settled that "although an indigent defendant has an absolute right to have counsel appointed to represent him . . . the Sixth Amendment does not guarantee representation by a lawyer in whom the defendant reposes special confidence or with whom the defendant is able to establish a "meaningful relationship." *United States v. Burns*, 990 F.2d 1426, 1437 (4th Cir.) (citing *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) and *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983)), *cert. denied*, 113 S. Ct. 2949 (1993). O'Dell's distrust of Ray was not based on objective facts; it was based on pure speculation.

The remaining grounds for O'Dell's ineffective assistance of counsel claim relate to whether Ray, as stand-by counsel, failed to ensure a proper competency evaluation (Claim Ic), whether the deficiency in O'Dell's defense at the sentencing phase suggested he was incompetent

(Claim Ie),[20] whether the Court denied O'Dell the resources necessary to defend himself, and whether stand-by counsel was unable to render effective assistance (Claim Ig).

O'Dell first asserts that Ray failed to provide Dr. Kreider with the information necessary for him to make a proper competency determination. In essence, the petitioner argues that Ray should have been more forceful in getting the prosecutor, Stephen Test, to provide information within his possession to Dr. Kreider.

O'Dell states Dr. Kreider evaluated him without:

> information pertaining to the alleged crime, copies of statements O'Dell had made to the police (including one to Detective Dunn when arrested), transcripts of the preliminary hearings to date (including those in which O'Dell declared his intent not to cooperate with any psychiatrist (3:5)), a summary of the reasons for the evaluation request, and a large number of available psychiatric, psychological, medical, and social records relevant to O'Dell's mental state.

(Pet. ¶ 38.)

The shortcoming here is that O'Dell acknowledges Ray asked the court to order the Commonwealth to provide relevant information, the Court so ordered the Commonwealth (although not in writing), and Ray had no

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[20] This claim overlaps with O'Dell's procedurally barred claims that the trial court failed to monitor his competence to continue *pro se*. It will not be considered on the merits in that respect.

access to the information. Therefore, his performance cannot be considered deficient under *Strickland v. Washington*, 466 U.S. 668 (1984). Whether Test complied with his obligations presents a different issue.

Next, the Petition argues that O'Dell indicated his incompetence to represent himself during the penalty phase by declaring his intention neither to beg for "mercy" nor to present mitigating evidence. (Tr. 56:76-77.) Although his representation and investigation of himself was probably deficient, O'Dell did, in fact, call and question witnesses on his behalf at the penalty phase of the trial. Therefore, the nature of his penalty phase defense – considered alone – did not render him incompetent *per se*.

In Claim If of the Petition, O'Dell argues that he was denied the resources necessary to represent himself. O'Dell complained at trial about having inadequate time to discuss his case with potential experts (Tr. 15:2-4) and the jail's lack of assistance in his legal research (Tr. 8:3, 12-13). He does not identify any specific materials he lacked nor how they would have aided his defense. He was warned about the handicaps he would face defending this case alone, but he chose to do it anyway. (*See, e.g.*, Tr. 6, 9, 12B.) Nothing he alleges in his petition on this issue, (*see* Pet. ¶ 215-217), amounts to a constitutional violation. *See United States v. Chatman*, 584 F.2d 1358 (4th Cir. 1978) (defendant who validly waived counsel had no right of access to legal materials); *Peterkin v. Jeffes*, 855 F.2d 1021, 1042-43 (3d Cir. 1988) (citing *Chatman*).

The petitioner's remaining ground for an ineffective assistance of counsel claim also lacks merit. O'Dell claims that he and Ray had a constitutionally ineffective

"hybrid" arrangement that constantly changed throughout the course of the trial. According to petitioner, this arrangement prejudiced his defense. Although this unfocused, hybrid arrangement was probably destined to fail, the fault lies with O'Dell himself. He vacillated between handling the case *pro se* and allowing Ray to take control. He did so despite repeated warnings from the court. (Pet. ¶ 48-69; *see, e.g.*, Tr. 6, 9, 12B.)

Therefore, because O'Dell has failed to demonstrate any constitutional deficiencies in his representation, it is not necessary for the Court to consider his claim of prejudice under *Strickland*.

VIII. SCIENTIFIC EVIDENCE AND EXPERTS

Claim II of the Petition concerns whether the Commonwealth unconstitutionally thwarted O'Dell's ability to challenge the scientific evidence brought against him. In general, the Commonwealth responds that admission of evidence is ordinarily a state law matter.

Petitioner maintains that one of the most hotly contested issues at trial and on appeal was the admission of the multisystem electrophoretic analysis of blood stains found on O'Dell's clothing. O'Dell asserts that several courts and commentators have rejected the reliability of electrophoresis. (*See* Pet. Opp. Mem., at 32.) Accordingly, he argues that the use of electrophoretic evidence at trial was constitutional error. (*See* Claims IIa-IIi.)

O'Dell states that most of these issues were erroneously dismissed without a hearing by the state habeas judge. Further, he argues that even where the state

habeas court held a hearing addressing the reliability of electrophoresis, the judge's ruling effectively rendered the hearing moot. The judge ruled that he would not disturb the Virginia Supreme Court's decision admitting the electrophoretic testing – allegedly made prior to the presentation at the hearing of new evidence demonstrating the unreliability of electrophoresis – even though the state habeas judge agreed that "current testing methods would have produced a different result." (Pet. ¶ 176.) Thus, O'Dell argues that none of his claims in Ground II have yet received a full and effective hearing.

O'Dell further argues that a federal habeas court has a constitutional duty to review newly discovered evidence not presented to the trial court. *Townsend v. Sain*, 372 U.S. 293, 317 (1963). Although *Townsend* has been overruled (*Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715 (1992)), O'Dell's DNA evidence warranted an evidentiary hearing on his factual innocence claim, *see, supra*, Claim V.

O'Dell has proved that the blood on O'Dell's shirt did not match the victim's blood and that tests of stains on O'Dell's jacket were inconclusive. Thus, petitioner argues that this is prima facie evidence that the electrophoretic evidence admitted at trial was unreliable and should have been excluded. Petitioner contends that because the DNA test has so seriously undermined the principal evidence supporting the conviction, no reasonable juror could find O'Dell guilty of the crime charged based on the other evidence presented.

A matter of state law "does not properly concern a federal habeas court unless it impugns the fundamental fairness of the trial." *Stockton v. Virginia*, 852 F.2d 740, 748

(4th Cir. 1988), *cert. denied*, 489 U.S. 1071 (1989). Thus, "[e]rrors in the admission or exclusion of evidence in a state criminal trial rise[ ] to the level of a constitutional deprivation only if the error is of such magnitude as to deny fundamental fairness." *Ward v. Johnson*, 690 F.2d 1098, 1109 (4th Cir. 1982) (citing *Lisenba v. California*, 314 U.S. 219, 227-28 (1941)).

In support of petitioner's claim that the Commonwealth unconstitutionally thwarted his ability to challenge the scientific evidence brought against him, he has argued the trial court erred in admitting electrophoretic evidence (Claim IIa), the Commonwealth failed to show the reliability of the multisystem electrophoretic test performed by expert witness Jacqueline Emrich (Claim IIb), Emrich's technique in performing the test fell below the applicable standard of care (Claim IIc), the Commonwealth's failure to preserve evidence for retesting violated due process (Claim IId), the trial court improperly denied petitioner an *ex parte* hearing in which to make his preliminary showing of a need for funds (Claim IIe), the trial court failed to provide reciprocal discovery (Claim IIf), the trial court refused to limit the Commonwealth's number of experts (Claim IIg), the trial court refused to limit Dr. Guth's testimony to those portions of his report dealing with serology (Claim IIi), and finally, that DNA test results demonstrate that the evidence admitted at trial was inaccurate (Claim IIj). There sub-claims will be addressed in the order in which they were raised.

In Claim IIa, the petitioner states that the Commonwealth did not establish the reliability of the multysystem electrophoretic enzyme test pursuant to the standard set

forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).[21] Therefore, he argues, the trial court violated his right to due process of law by admitting the test results. The Commonwealth responds that the trial judge properly determined that there was sufficient general acceptance of electrophoresis to enable him to take judicial notice of its reliability.

State courts are split on the reliability of electrophoretic testing. *See* Michael R. Flaherty, Annotation, *Admissibility, in Criminal Cases, of Evidence of Electrophoresis of Dried Evidentiary Bloodstains*, 66 A.L.R. 4th 588 (1988) (and cases cited). In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), the Supreme Court ruled that the Federal Rules of Evidence superseded the *Frye* test for cases in federal court. By implication, a state court's refusal to apply *Frye* does not deny a criminal defendant due process of law. *See id.* at 2796. Although the Virginia Supreme Court refused to adopt the *Frye* test, it noted that "[e]ven if [*Frye*] were the law in Virginia, the evidence was sufficient to meet it." *O'Dell v. Commonwealth*, 364 S.E.2d at 504.[22]

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[21] *Frye* held that before scientific evidence could be admitted in a trial, the evidence had to have "gained general acceptance in the particular field in which it belongs." *Id.* at 1014.

[22] O'Dell claims that the trial court violated his right to due process of law because the Commonwealth failed to establish the reliability of Emrich's test (Claim IIb), and because Emrich's technique fell below the applicable standard of care (Claim IIc).

The government counters that testimony as to reliability was given by two experts, and the trial court properly rejected contradictory testimony by petitioner's expert. Furthermore, it

Petitioner's next claim is that the Commonwealth's failure to preserve evidence for retesting violated due process and constitutes bad faith (Claim IId). "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (failure to preserve potentially exculpatory semen samples does not violate due process if no evidence of bad faith). O'Dell has not offered any evidence as to bad faith except the nature of the evidence itself.

Youngblood dealt with a case in which the police had failed to preserve semen samples taken from a victim of child molestation, sexual assault, and kidnapping. The *Youngblood* Court explained the reasoning of the earlier case of *California v. Trombetta*, 467 U.S. 479 (1984), which involved the failure of police to preserve breath samples

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argues the alleged dangers of any supposed unreliability of electrophoretic evidence were reduced in this case because the trial court refused to admit statistical evidence. It also notes the petitioner was permitted to offer substantial testimony criticizing Emrich's procedures.

As discussed more extensively in regard to O'Dell's innocence claim, DNA evidence has established a "fair probability" that the electrophoretic evidence yielded an erroneous result. However, this ground of contention is primarily a state evidentiary matter. The record demonstrates that O'Dell's stand-by counsel cross-examined Emrich on her testing procedures. (Tr. 48B.) The trial court's decision to admit Emrich's testimony did not undermine the fundamental fairness of the trial, and, therefore, admission of the evidence did not amount to constitutional error. *See Spencer v. Murray*, 5 F.3d at 762-63.

that were potentially useful in prosecutions for drunken driving.

Under *Trombetta*, the failure of the police to preserve evidence did not violate due process where: (a) the officers acted in "good faith and in accord with their normal practice," *Id.* at 488; (b) "in light of the procedures actually used the chances that preserved samples would have exculpated the defendants were slim," *Youngblood*, 488 U.S. at 56, and (c) "even if the samples might have shown inaccuracy in the tests, the defendants had 'alternative means of demonstrating their innocence,' " *Youngblood*, 488 U.S. at 56 (quoting *Trombetta*, 467 U.S. at 490).

The state court in *Youngblood* had found that the defendant might have been exonerated had the semen samples been tested in a timely fashion. As a result, the state court reversed the conviction. *Id.* at 54. The Supreme Court reversed. The Court noted that *Trombetta* speaks of evidenced whose exculpatory value is "apparent" and that the exculpatory nature of the evidence must be apparent "before the evidence was destroyed." *Id.* at 56 (footnote) (quoting *Trombetta*, 467 U.S. at 489) (alteration in original).

As in *Youngblood*, there is no indication here that the exculpatory nature of the evidence was apparent to the police before the evidence was destroyed. Instead it was "simply an avenue of investigation that might have led in any number of directions," and is accordingly insufficient evidence of bad faith. *Id.* at 56 (footnote). Additionally, the destruction was made in accordance with routine procedures, and the petitioner had alternative means of

attacking the reliability of the test results. *See O'Dell v. Commonwealth,* 364 S.E.2d at 498.

This case differs from *Youngblood* in one important respect, however. In *Youngblood,* the prosecution did not use the potentially exculpatory evidence in its case in chief. *Id.* at 56. It is possible, therefore, that this Court could infer bad faith by considering the failure to preserve the blood samples in tandem with the use of the government's tests against the petitioner in its case in chief. *Youngblood* did not specifically incorporate the prosecution's use or non-use of the evidence into its analysis, but it is reasonable to conclude that the use of the evidence is merely one factor to consider in deciding the ultimate question of whether the police acted in "bad faith." *See id.* at 58 (bad faith requirement limits obligation to preserve evidence to "those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant"). Here, because the exculpatory nature was not apparent at the time of destruction, O'Dell's claim is insufficient as a matter of law.

Petitioner's next ground for relief, Claim IIe, is without merit as well. This claim alleges that in denying O'Dell an *ex parte* hearing in which to make his preliminary showing of need for serological experts, the trial court forced O'Dell to reveal his trial strategy to the prosecution.

As the prosecution contends, there is no authority requiring the holding of such hearings in the absence of the prosecution. *C. Lawson v. Dixon,* 3 F.3d 743 (4th Cir. 1993) (statute requires *ex parte* hearings on motions for

expert assistance in most federal cases). O'Dell argues that requiring him to disclose the identify of his experts to the prosecution in order to secure government funds constitutes an unconstitutional condition of his right to secure witnesses in his favor.[23] The unconstitutional

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[23] In order to accept his argument, the Court would have to disagree with the Virginia Supreme Court's finding that the defendant "had no constitutional right requiring the Commonwealth to provide funding of this type of expert assistance." *O'Dell,* 364 S.E.2d at 499.

In *Ake v. Oklahoma,* 470 U.S. 68 (1985), the Supreme Court required Oklahoma to provide an indigent with access to a psychiatric exam when the defendant's sanity will be an issue in the case. The Court stated that in outlining the contours of the state's obligation to provide indigent defendants with "an adequate opportunity to present their claims fairly within the adversary system," the Court had examined the "basic tools of an adequate defense or appeal." *Id.* at 77. The court in *Ake* identified three factors relevant to deciding whether a state had to pay for a particular defense tool. Those factors were: (a) "the private interest that will be affected by the action of the State," (b) the government interest that will be affected if he [sic] safeguard is to be provided," and (c) "the probable value of the additional or substitute procedural safeguards that are sought and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Id.*

In O'Dell's case, the private interest affected was the interest of a criminal defendant in a murder trial in obtaining an independent expert to test a blood sample left on his clothing to determine whether it matched the victim's blood. The State's use of its own experts in its case in chief heightened O'Dell's need for the evidence. The government interest that would be affected is the increased financial burden that would result of it were required to pay for the defendant's chosen expert. Finally, there is a risk of erroneous conviction if a defendant lacks the scientific knowledge to attack the government expert's conclusions.

conditions doctrine prevents the government from forcing a defendant to choose between two constitutionally protected rights. *United States v. Dent*, 984 F.2d 1453 (7th Cir.) (citing *Simmons v. United States*, 390 U.S. 377, 394 (1968)), *cert. denied*, 114 S. Ct. 169 (1993). It is worth emphasizing that: "The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments [ ] as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always

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Under the *Ake* analysis, both sides have valid arguments, but O'Dell's is the stronger of the two. It is not a stretch from *Ake*'s requirement that a psychiatrist be appointed to O'Dell's argument that he was entitled to his own expert. This is especially true in a case such as this, where the blood test is an important part of the prosecution's case. *See id.* at 80 ("when the State has made the defendant's mental condition relevant . . . the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense"). A similar question was expressly left open in *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) (because the defendant "offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process").

However, O'Dell raises this issue only in terms of arguing that the lack of an *ex parte* hearing on his need for expert testimony was an "unconstitutional condition." He does not raise the argument directly that the state's failure to provide money for his own expert prejudiced his ability to present an adequate defense, but merely claims that he was at a disadvantage because the state had more experts than he did. This is because O'Dell was provided with at least one expert, chemist Dr. Joseph Guth. O'Dell declined to call Dr. Guth because the trial court held that Dr. Guth's entire report was subject to cross-examination. (Pet. ¶ 71.)

forbid requiring him to choose." *United States v. Frazier*, 971 F.2d 1076 (4th Cir. 1992) (quoting *Crampton v. Ohio*, 402 U.S. 183, 213 (1971) (citations omitted)), *cert. denied*, 113 S. Ct. 1028 (1993).

Assuming, for the sake of argument, criminal defendants should have the right to an *ex parte* hearing at which they may seek expert assistance, O'Dell would still not be entitled to relief. O'Dell has offered no support for the proposition that his decision to seek the assistance of an expert without the benefit of an *ex parte* hearing resulted in the disclosure of any harmful information. In addition, while O'Dell might have been entitled to reciprocal discovery of the Commonwealth's experts, the trial courts denial of such discovery did not render the trial fundamentally unfair.[24] Therefore, O'Dell has not met the threshold necessary to merit an evidentiary hearing on these issues (claims IIe and IIf).

The Court now turns to a consideration of whether the trial court's refusal to limit the Commonwealth's

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[24] The defendant in *Wardius v. Oregon*, 412 U.S. 470 (1973), had been unconstitutionally required to give notice of his intent to use an alibi defense without having any reciprocal discovery rights from the government. Although the defendant here was not specifically required to give notice that he wanted to use experts, *Wardius* is arguably applicable. The theme in *Wardius* was that a criminal trial is a search for truth, not a poker game. *See id.* at 475-76. There is no apparent reason why the government did not disclose the identity of its experts to O'Dell upon his request. However, any prejudice was mitigated by the fact that O'Dell had the benefit of his own expert.

number of experts or, in the alternative, to grant a continuance to allow a particular expert to testify, deprived O'Dell of due process (Claim IIg).

The defendant was denied a continuance in order to secure the testimony of Dr. Benjamin Grunbaum, who was willing to testify but had a commitment abroad. (Pet. ¶ 105.) Dr. Grumbaum was assertedly the "foremost authority on the kind of multisystem electrophoretic testing of bloodstains" performed by the state's expert. *Id.* Instead, the petitioner claims he was relegated to using a geneticist who had no training in the specific test used on the bloodstains. *Id.*

Whether to grant a continuance is ordinarily within the discretion of the trial judge. *See Ungar v. Sarafite*, 376 U.S. 575 (1964) (judge denied continuance to give defendant time to engage counsel). "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.* at 589. When a criminal defendant offers no more than undeveloped assertions that additional experts would be beneficial, the Supreme Court has indicated that the test to be used in determining whether every prosecution expert must be balanced by a defense expert or be excluded from testifying is one of reasonableness. *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 2637 n.1 (1985). The trial judge here was clearly concerned about continuing the trial excessively to accommodate Dr. Grunbaum. He was also concerned about duplicative witnesses. (*See* Tr. 29:11-12.) Based on a review of the record, the trial judge's decisions to allow

the testimony of the Commonwealth's witnesses, and to deny O'Dell's motion for a continuance, were reasonable under the circumstances.

Continuing his attack on matters primarily within the purview of the state courts, O'Dell avers that the trial judge deprived him of the assistance of an expert by ruling that Dr. Joseph H. Guth could be cross-examined as to any matter in his report, and that O'Dell could not limit Guth's testimony to his serological findings (Claim IIi). O'Dell claimed that because of Guth's findings on other subjects, he "had no choice but to decline to call Dr. Guth at trial." (Pet. ¶ 72.)

The trial judge's ruling on the scope of Dr. Guth's cross-examination did not deprive O'Dell of any constitutional right. Again, such evidentiary matters are properly left to the discretion of the trial judge as long as the judge's ruling does not violate fundamental fairness. *See Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475 (1991) (habeas corpus relief does not lie for errors of state law); *Spencer v. Murray*, 5 F.3d 758 (4th Cir. 1993).

IX. PAROLE INELIGIBILITY

In *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994), the Supreme Court held that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, the Due Process Clause of the Fourteenth Amendment requires that the sentencing jury be informed that the defendant is not eligible for parole. Before considering whether *Simmons* should affect this Court's analysis of O'Dell's habeas petition (Claim III), the Court must perform a separate, threshold inquiry.

> When a petitioner seeks federal habeas relief based upon a principle announced after a final judgment, [*Teague v. Lane*, 489 U.S. 288 (1989)], and our subsequent decisions interpreting it require a federal court to answer an initial question, and in some cases a second. First, it must be determined whether the decision relied upon announced a new rule. If the answer is yes and neither exception applies, the decision is not available to the petitioner. If, however, the decision did not announce a new rule, it is necessary to inquire whether granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent.

Stringer v. Black, 503 U.S. ___, ___, 112 S. Ct. 1130, 1135 (1992).

Thus, the first question is whether *Simmons* announced a new rule. "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301; *Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 510 (U.S. 1992). There is no question that the precedents guiding the Court's analysis in *Simmons* were well established. *Simmons*, 114 S. Ct. at 2194 (case "cannot be reconciled with our well-established precedents interpreting the Due Process Clause"). As the Supreme Court stated in *Simmons*, the application of those precedents was also well-established under the Due Process Clause:

> [I]f the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life

> without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole eligibility allows the defendant to "deny or explain" the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.

Id. at 2196 (citing *Gardner v. Florida*, 430 U.S. 349 (1977)).[25]

Although the respondents rely on *Peterson v. Murray*, 904 F.2d 882 (4th Cir.), *cert. denied*, 498 U.S. 992 (1990), to contend that *Simmons* created a new rule, *Peterson* dealt with a defendant who would have been eligible for parole in twenty years. *Id.* at 886. In contrast, the Supreme Court itself cited the Virginia Supreme Court's decision in O'Dell's case as an example of improper reliance on existing precedent.[26] Furthermore, the *Peterson* court based its decision on the fact that decisions about parole eligibility are ordinarily not the concern of the state judiciary, but of a state executive department. *Peterson*, 904 F.2d at 886 (citing *Williams v. Commonwealth*,

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[25] Similarly, such a result would also be dictated by existing precedent under the Eighth Amendment. *See Simmons*, 114 S. Ct. at 2198 (Souter, J., concurring) (Eighth Amendment requires judge to tell jury what "life imprisonment" means, when defendant so requests).

[26] "Only two States other than South Carolina have a life-without-parole sentencing alternative to capital punishment for some or all convicted murderers but refuse to inform sentencing juries of this fact." *Simmons*, 114 S. Ct. at 2196 (citing *O'Dell v. Commonwealth*, 234 Va. 672, 701, 364 S.E.2d 491, 507, *cert. denied*, 488 U.S. 871 (1988)).

234 Va. 168, 178-80, 360 S.E.2d 361, 367-68 (1987), *cert. denied*, 484 U.S. 1020 (1988)). Those concerns are not present in this case. *See Simmons*, 114 S. Ct. at 2199 (Souter, J., concurring) ("The answer [to whether the defendant would be eligible for parole] was easy and controlled by state statute.")[27]

The prosecutor in O'Dell's case obviously used O'Dell's prior releases on cross-examination, (*see* Tr. 56:141-144), and in his closing argument, (*see* Tr. 56:178, 202, 204), to argue that the defendant presented a future danger to society.[28] On cross-examination during the

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[27] Although recognizing that withholding information about parole eligibility presented serious constitutional problems, the state trial court was understandably reluctant to depart from state law. Prior to trial, the trial judge described evidence of parole ineligibility as a "very, very relevant matter" in a capital case. He also stated that it "could become a very key issue as to whether the jury should be told at some point what effect [parole] would have on [the defendant], so just bear that in mind. It's going to be a difficult problem for the Commonwealth, [the defendant], and the Court if it becomes an issue; and it very well may." (Tr. 31:61-62.)

[28] The jury found "a probability that [O'Dell] would commit criminal acts of violence that would constitute a continuous serious threat to society . . . " (Tr. 56:208.) It additionally found that "his conduct in committing the offense was outrageously wanton, vile or inhuman and it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder . . . " (*Id.*) The Virginia Supreme Court determined on direct appeal that the jury did not base its verdict on the vileness predicate. *O'Dell v. Commonwealth*, 364 S.E.2d at 507.

A review of the record of the sentencing hearing makes clear, as explained below, the danger that the constitutional violation had a "substantial and injurious effect or influence" in

penalty phase of the trial, the following exchange occurred between O'Dell and the prosecutor:

Q: Going back to the date that you have testified you were in prison and released, I think you testified you been [sic] in prison twenty-two years of your adult life; is that correct?

O'DELL: That's correct.

Q: You first went in sometime in 1957?

O'DELL: Went in in 1957 when I was sixteen years old. I went in in 1961 when I was nineteen years old. I went in in 1975 when I was thirty-two years old.

Q: When did you get out from the first time you went in?

O'DELL: I got out on February the 9th, 1961.

Q: And you went back [in] 1961?

O'DELL: That's right.

Q: What date did you go back in?

O'DELL: I went back in September, 1961.

Q: So you were out seven months?

O'DELL: Yes, sir. That was twenty-five years ago, Mr. Test.

Q: You went back in in 1961. When were you released?

O'DELL: I was released January 22, 1974.

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the jury's decision to impose the death penalty. *See Brecht v. Abrahamson*, 113 S. Ct. 1710, 1721-22 (1993).

Q: And you were arrested again for the offense regarding Mrs. Doyle on February 5, 1975; is that correct?

O'DELL: Yes, sir.

Q: So you were out approximately thirteen months?

O'DELL: That's correct.

Q: And you were paroled on the offense in Florida on August 3, 1982?

O'DELL: That's correct.

(Tr. 56:142-43.)

In his closing argument, the prosecution used O'Dell's prior releases to his detriment:

> [O'Dell] has told you since he was fifteen, except for a sparse three or four years, he has lived behind bars. That has not been enough to prevent the continual mounting of this criminal history. You will recall that someone in this case who testified to you was referred to as a career criminal.
>
> I submit to you ladies and gentlemen if there is a career criminal, it is Joseph Roger O'Dell for he knows nothing else other than violating the laws of this country. Not only in the State of Virginia but in another state as well; and it is interesting, is it not, that there is a graduation of the seriousness of the offenses from use of a car to a robbery to a murder to an abduction and another robbery and now to an other murder?
>
> Isn't it interesting that he is only able to be outside of the prison system for a matter of

> months to a year and half before something has happened again?

(Tr. 56:177-78.)

Later, the prosecutor stated:

> [Y]ou may sentence him to life in prison, but I ask you ladies and gentlemen in a system, in a society that believes in its criminal justice system and its government, what does this mean?
>
> * * *
>
> I put it to you ladies and gentlemen. What is right in this case is that this man has forfeited his right to live among us because all the times he has committed crimes before and been before other juries and judges, no sentence ever meted out to this man has stopped him. Nothing has stopped him, and nothing ever will except the punishment that I now ask you to impose.

(Tr. 56:204.)

As the preceding quotations demonstrate unequivocally, the prosecution put O'Dell's future dangerousness in issue at the penalty phase. Like the defendant in *Simmons*:

> [P]etitioner was prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death. The State raised the specter of petitioner's future dangerousness generally, but then thwarted all efforts by petitioner to demonstrate that, contrary to the prosecutor's intimations, he never would be released on

> parole and thus, in his view, would not pose a future danger to society.

Simmons, 114 S. Ct. at 2194.

That future dangerousness was an issue at trial does not end the inquiry, however. O'Dell must also show that he is ineligible for parole. Because the Virginia courts did not make specific findings on the issue, the state courts should have the opportunity to make that determination. If O'Dell would have been ineligible for parole at the time of the sentencing hearing, the Due Process Clause's guarantee that a defendant not be convicted on the basis of information that he had no opportunity to "deny or explain," and the Eighth Amendment's requirement of heightened reliability in capital cases, require that O'Dell receive a new sentencing proceeding. *See Simmons v. South Carolina*, 114 S. Ct. at 2190-201 (majority opinion and concurrences); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (due process and Eighth Amendment); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (containing quoted material).

X. PENALTY PHASE INSTRUCTIONS

The petitioner contends that the trial court's instructions to the jury at the penalty phase were constitutionally inadequate because they failed to define "mitigation" and because they allegedly gave undue emphasis to statutory aggravating factors over non-statutory mitigating factors (Claim VII). The Virginia Supreme Court held that the trial court correctly refused to give some instructions on mitigation because either they did

not correctly state Virginia law or they embodied principles of law not applicable to the facts in his case. The court added that the instructions given sufficiently covered the subject of mitigation. *See O'Dell v. Commonwealth*, 364 S.E.2d at 507.

"It is inappropriate for the federal courts on collateral review to go beyond the correction of fundamental errors implicating due process rights and attempt to prescribe the particular form which state jury instructions on mitigation must take, becoming mired in the nuances of definition and technicalities of draftsmanship." *Briley v. Bass*, 750 F.2d 1238, 1245 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985). In this case, the trial court's instructions, (Tr. 56:172-74), did not "render the death sentence in any way mandatory or preclude consideration of any relevant mitigating evidence." *See id.*

XI. CROSS-EXAMINATION OF STEVEN WATSON

Steven Watson, who had been incarcerated with O'Dell in the Virginia Beach city jail, appeared at O'Dell's trial as a surprise government witness. (Tr. 47B.) Watson testified that on the night of March 1, 1985, he and O'Dell had a conversation in which O'Dell confessed to the murder of Helen Schartner. (Tr. 47B:6-8.)

O'Dell argues that by calling Watson as a surprise witness, the Commonwealth prevented any meaningful cross-examination. (Pet. ¶ 297 and Claim VIII.) He also claims that the trial court "sharply curtailed" his efforts to cross-examine Watson on the issue of motive, "notwithstanding O'Dell's proffer that Watson had likely

struck a deal with the Commonwealth in exchange for his testimony against O'Dell." (*Id.*)

"[E]xposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974). However, the trial judge has the discretion to impose reasonable limitations on cross-examination. *Delaware v. Van Arsdall*, 476 U.S. 673, 678-79 (1986). Although the trial judge in this case sustained several government objections to cases inquiring into Steven Watson's possible basis, O'Dell cross-examined Watson thoroughly on that subject. Through the cross-examination, O'Dell elicited evidence that Watson might have been angry at O'Dell because of statements O'Dell made about the race of Watson's wife and children, and that Watson might have struck a deal with the government to have charges against Watson and his wife dropped. (*See* Tr. 47B:9-33 and Appendices.) Thus, O'Dell was not denied the right to meaningfully cross-examine Watson.

XII. SUFFICIENCY OF THE EVIDENCE

Much of the factual material relevant to this claim has been discussed previously in reference to O'Dell's innocence claims. and will not be repeated here. (*See, supra*, Part V.) However, the legal standard is different. In evaluating a claim as to the sufficiency of the evidence (Claim IX), "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt." *Jackson v. Virginia*, 443 U.S. 307, 321-324 (1979); *see also Herrera*, 113 S. Ct. at 875 (White, J., applying same standard to factual innocence claim). The findings of the Virginia Supreme Court with respect to the sufficiency of the evidence are presumed correct. *See* 28 U.S.C. § 2254(d).

As stated extensively in reference to O'Dell's innocence claims, a rational trier of fact could have found petitioner guilty of the crimes charged. Aside from the scientific evidence introduced at trial, enough other evidence was introduced to deny this claim.

XIII. EXCULPATORY EVIDENCE

The petitioner next claims that "unusual occurrences leave little doubt that there was a deal between [Steven] Watson and the Commonwealth." The crux of this claim is that Steven Watson, a surprise prosecution witness who testified that O'Dell had confessed to him in prison, has made statements after the direct appeal that indicate a plea agreement existed. (Pet. ¶¶ 108-124 and Claim X.)

Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and *United States v. Bagley*, 473 U.S. 667 (1985), the prosecution is required to disclose evidence that is both favorable to the accused and "material" to guilt or punishment. The evidence is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. *Bagley*, 473

U.S. at 682. If the petitioner could now prove the existence of a plea agreement, it would surely meet the *Bagley* standard.

Still, the government argues that the Virginia Supreme Court found that no such plea agreement existed, and that this Court is therefore bound by 28 U.S.C. § 2254(d) from revisiting this question. Petitioner counters that he did not receive a "full, fair, and adequate hearing in the State court proceeding" – which is an exception to § 2254 – because of the state habeas court's application of procedural bars. 28 U.S.C. § 2254(d)(6).

O'Dell points to the following as newly discovered evidence obtained after the direct appeal: Watson admitted that (i) he bargained with authorities prior to the dropping of his West Virginia charges; (ii) in response to a letter, he received a telephone call from the Commonwealth's prosecutor in Virginia Beach, which led to a face-to-face meeting, (iii) there "may have been" a deal communicated to his attorney that he did not know about, and (iv) O'Dell might not have actually confessed to the murder. (*See* Petitioner's Reply Mem. at 42-43.) O'Dell argues that combined with restrictions on his cross-examination of Watson, this evidence justifies a hearing in federal court on whether the conviction was obtained by perjured testimony.

Although Watson's statements indicate the possibility that an agreement existed, the new evidence does not merit a hearing. Importantly, the petitioner does not argue that he did not receive a full, fair and adequate opportunity to develop the facts on direct appeal. The state habeas court's application of procedural bars merely

prevented that court from revisiting the Virginia Supreme Court's acceptance of the trial court's factual findings.

If this court were to hold an evidentiary hearing on Watson's status, petitioner would have the burden "to establish by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d). The new evidence about Watson adds doubt about his credibility, but does not rebut the state courts' finding that no plea agreement existed. As stated earlier in this Opinion, O'Dell was offered an ample opportunity at the trial to develop the facts. Watson's post-trial statements alone would not permit this Court to reject the factual findings of the state courts. *See Poyner v. Murray*, 964 F.2d 1404, 1415-16 (4th Cir.) ("Because we are satisfied that [the petitioner] already has been afforded ample opportunity to develop [the] facts, we must deny relief on this claim."), *cert. denied*, 113 S. Ct. 419 (1992). [29]

XIV. TRIAL JUDGE'S INSTRUCTIONS

O'Dell next argues that the Commonwealth frequently told jurors during voir dire that their role was to "recommend" a sentence of life or death. This problem apparently arose from language in Virginia Code section 19.2-264.2, which states: "In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be

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[29] Later in his Petition, at Claim XVII, O'Dell again attempts to prove the existence of an agreement between Watson and the Commonwealth in arguing that Watson committed perjury. That claim also must be dismissed. *See* 28 U.S.C. § 2254(d).

imposed unless the court or jury shall . . . (2) recommend that the penalty of death be imposed." Va. Code § 19.2-264.2.

References to the appellate review process are normally off-limits in death penalty cases. In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Court decided whether a death sentence is valid when the "sentencing jury is led to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case." *Caldwell*, 472 U.S. at 323. The Court held that leading the jury to believe that ultimate responsibility rests elsewhere undermines the reliability of the jury's exercise of sentencing discretion. *Id.* at 328.

In brief, the *Caldwell* Court rested its decision: (a) on the presumption of correctness appellate courts give to jury determinations, (b) the danger that juries might more freely err in favor of "sending a message" of extreme disapproval of the defendant's acts, (c) the danger of jury bias in favor of giving appellate courts the option to impose a death sentence, and (d) the danger that jurors would minimize the importance of their role. *Id.* at 330-334.

Although the Virginia statute states that the court or jury shall "recommend that the penalty of death be imposed," the word "recommend" presents the same dangers listed in *Caldwell*. *See* Va. Code § 19.2-264.2. However, although the jurors heard the misleading term "recommend" during voir dire, they were properly instructed at the penalty phase. This fact makes O'Dell's case different from the facts in *Caldwell*, and cures any

constitutional defects in the voir dire. *See Gaskins v. McKellar*, 916 F.2d 941 (4th Cir. 1990) (court did not imply jury's recommendation was non-binding), *cert. denied*, 500 U.S. 961 (1991); *Smith v. Dixon*, 996 F.2d 667 (4th Cir. 1993) (citing *Gaskins*). For example, the trial court instructed the jury at least four times during the penalty phase that their responsibility was to "fix" the sentence at death or life imprisonment. (*See* Tr. 56:172-174.) The verdict forms contained the same term. (*See id.* at 205.)[30]

XV. COMPOSITION OF THE JURY

According to the petitioner, potential black and hispanic jurors were systematically excluded from the venire before O'Dell's trial. He states: "[T]he large presence of military personnel and the total exclusion of blacks and hispanics [from the venire] most likely resulted from the fact that the trial judge asked the jury clerk to hand pick O'Dell's jury to insure that none of the jury had ever sat on a capital case. The jury clerk misunderstood the judge's request and only selected venirepersons who had never sat on any jury. However the trial judge failed to commence a new voir dire." (Pet. ¶ 333-34.) Thus, O'Dell avers that the state violated his Sixth Amendment right to

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[30] The trial judge used the word "recommend" once but quickly corrected himself. He stated: "The first instruction which I read to you has been reiterated by the Commonwealth is that in order for you to find the defendant – not to find but to recommend the punishment, fix the punishment at death, you must find one of two things as having been done. . . . " (Tr. 56:204.)

a venire that represented a fair cross-section of the community. (Pet. ¶ 331; Claim XIII.)

The Commonwealth appropriately moves to dismiss this claim on the ground that the petitioner has not offered any evidence of the "active discrimination" necessary to have a viable claim. *See, e.g., United States v. Cecil*, 836 F.2d 1431, 1445 (4th Cir.) ("After all, the Constitution does not require that the juror selection process be a statistical mirror of the community; it is sufficient that the selection be . . . gathered without active discrimination."), *cert. denied*, 487 U.S. 1205 (1988). Petitioner's only evidence is that the trial judge instructed the clerk to select a jury that had not served on a capital jury before, and the clerk misinterpreted his request by picking a venire that had never served on any jury previously. This, alone, does not constitute active discrimination.

XVI. JURY SELECTION

The petitioner contends that three jurors were wrongfully retained in the venire despite testifying at voir dire that they might consider a defendant's failure to testify as evidence of his guilt (Claim XIVa). He also claims one juror stated that he would credit the testimony of a police officer over that of another non-police witness,[31] and that three jurors were excused for cause because they had reservations about imposing the death penalty.

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[31] O'Dell used a peremptory challenge to remove this juror, but he argues that the trial judge should have stricken this juror for cause.

As the Commonwealth argues, the § 2254(d) presumption of correctness applies to the finding of the trial judge that an individual juror is impartial. A reviewing court must decide "whether there is fair support in the record for the state courts' conclusion that the juror would be impartial." *Patton v. Yount*, 467 U.S. 1025, 1036-38 (1984), *cited in Adams v. Aiken*, 965 F.2d 1306 (4th Cir. 1992).

In *Adams v. Aiken*, 965 F.2d 1306 (4th Cir. 1992), the Fourth Circuit panel considered whether a criminal defendant was denied his Sixth Amendment right to an impartial jury when one of the prospective jurors stated during voir dire that he would believe a police officer's testimony before that of a private citizen. The court held that the defendant's right to an impartial jury was not violated because the record supported the trial judge's conclusion that the juror would be impartial. *Adams*, 965 F.2d at 1317. That juror told the judge that he could decide the case based on the evidence and the instructions. *Id.*

Adams distinguished a case where the court ordered a retrial because the district court failed to ask prospective jurors whether they were biased in favor of police testimony. The difference in *Adams*, stated the court, was that the "police testimony [ ] did not form a predominant part of the government's case." *Id.* at 1317. In addition, Adams could not show that he had been prejudiced, because he still had peremptory strikes available. *Id.*

Based on *Adams*, the petitioner's Sixth Amendment right to an impartial jury was not violated by juror Curtis

Foust being retained in the venire. According to the central theme of the Petition, the blood tests and the jailhouse confession – not police testimony – were the predominant part of the prosecution's case. *See id.*

The same reasoning applies to the retention of jurors who stated that they would hold the petitioner's failure to testify against him, and to the exclusion of jurors who had qualms about sentencing a defendant to death. Those factual determinations are covered under § 2254(d), and the state courts' findings must be presumed correct. *See Patton,* 467 U.S. at 1036-38. Petitioner avers that these claims have never received a full and fair hearing on state habeas, but does not make that argument with respect to the state trial court and the state Supreme Court. (*See* Reply Mem. at 51.)

XVII. VOIR DIRE QUESTIONS

Turning to the voir dire, O'Dell maintains that the jury was selected in a manner that unlawfully emphasized a probability that the death sentence would be imposed. He complains that the trial judge "asked each juror eight questions concerning the possibility that they should be excused for opposition to the death penalty, and only two questions on their prejudice in favor of the death penalty." (Pet. ¶ 342 (citing Tr. 34:66, 34:173, 35:22, 35:75, 35:101, 36:30, 37:48, 37:104, 37:142, 38:37, 38:75, 38:83, 38:104, 38:145).)

The respondents correctly point out that no relevant case law in the Fourth Circuit requires that the balance of questions be equal. Thus, the petitioner seeks the creation of a new rule, which is not permissible in federal habeas

corpus proceedings. *See Teague v. Lane,* 489 U.S. 288 (1989).

XVIII. PENALTY PHASE EVIDENCE

During the penalty phase of O'Dell's trial, jurors heard testimony as to his prior criminal history. Two alleged incidents are at issue here (Claim XVI). The first concerns O'Dell's 1964 conviction for the second-degree murder of Lloyd Bess. According to O'Dell, that conviction was "based in large part on the perjured testimony of Walter Heath, an inmate, who stated, in direct contradiction to the testimony of a number of other inmates, that O'Dell had attacked Lloyd Bess." (Pet. ¶ 347.) Next, the petitioner states: "Similarly . . . the court permitted Donna Doyle to testify that O'Dell had kidnapped and sexually assaulted her during the commission of a robbery in Florida in 1975. The sexual assault charges, however, had been dropped for lack of sufficient evidence." (*Id.* at ¶ 348.) Thus, O'Dell argues that, given his "checkered psychiatric history, his criminal record . . . is an unreliable indicator of his criminal disposition." (*Id.* at ¶ 349.)

The Commonwealth responds that the petitioner's first claim – that the jury was permitted to rely upon a conviction based upon perjured evidence – has never been presented in a state court and is procedurally barred. (*See* Mem. in Opp. at 45-46.) Next, the respondents contend that the Doyle testimony was properly admitted as "prior unadjudicated conduct" presenting no constitutional infirmities. The petitioner did not respond

to the respondents' arguments for dismissal of these claims.

The first claim is procedurally barred. *See Wainwright v. Sykes*, 433 U.S. 72 (1977); *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975). The Doyle evidence claim was reviewed by the Virginia Supreme Court, which examined Florida court records and found no reference to a dismissal of the charges. That factual finding is presumed correct, and nothing O'Dell alleges could rebut that determination by convincing evidence. *See* 28 U.S.C. 2254(d).

XIX. EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The Due Process Clause of the Fourteenth Amendment guarantees a convicted defendant effective assistance of counsel on his direct appeal. *See Evitts v. Lucey*, 469 U.S. 387 (1985). It is unnecessary for the Court to inquire as to whether appellate counsel was deficient in representing O'Dell on his direct appeal. Because O'Dell has not established that any deficiency in his representation caused him prejudice, he has failed to state a claim for ineffective assistance of appellate counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984).

XX.[32] STATE SUPREME COURT'S APPLICATION OF PROCEDURAL BARS

The petitioner's next claim is that "the Supreme Court of Virginia [applied its procedural bar rules] so broadly and reflexively that it curtailed O'Dell's constitutional right to have his death sentence meaningfully reviewed by an appellate court, while serving no legitimate state interest." (Pet. ¶ 369; Claim XX.)

Obviously, this Court is bound by a state court's determination of the applicability of its procedural rules. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). As indicated earlier in this Opinion, (*see, supra*, Part IV), the federal courts are obligated to consider claims procedurally barred by state law only when the application of the procedural bar abridges a federal constitutional right. The Court has considered on the merits claims otherwise procedurally barred by *Coleman* and found them to be without merit.

XXI. PRECLUSION OF STATE HABEAS REVIEW

In Claim XXI of his Petition, O'Dell makes three independent arguments that the state courts denied him a full and fair adjudication of the claims presented in his state habeas corpus petition. First, he argues that the

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[32] This and the remaining claims were improperly numbered in the Petition and the respondents' Memorandum in Support of the Motion to Dismiss. The Court has used the corrected chart of the claims, which is attached as Exhibit A to the petitioner's Memorandum in Opposition to the Motion to Dismiss.

Virginia courts' application of the procedural bars discussed in *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970) and *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), undermines the principle of comity underlying the exhaustion requirement of federal habeas corpus. (*See* Pet., ¶ 378 (citing *Rose v. Lundy*, 455 U.S. 509, 518 (1982)).)

Petitioner's claim has been expressly rejected by this Court in a prior case, and the Court adheres to its reasoning. *See Pruett v. Thompson*, 771 F. Supp. 1428, 1439 (E.D. Va. 1991) (Opinion of Spencer, J.) ("Petitioner's argument about the logical inconsistency between a finding of repetition [*Hawks*] and procedural default [*Slayton*] is also meritless."), *aff'd*, 996 F.2d 1560 (4th Cir.), *cert. denied*, 114 S. Ct. 487 (1993). *Hawks* does not bar this Court from deciding any claims on collateral review. *Slayton* is a procedural bar. *Id.*; *Turner v. Williams*, 812 F. Supp. 1400, 1414 n.11 (E.D. Va. 1993).

Next, O'Dell argues that the state habeas court should have made findings of fact and conclusions of law on (i) O'Dell's competency to represent himself, (ii) Dr. Krieder's qualifications, and (iii) whether sufficient information was provided to Dr. Krieder before he determined O'Dell to be competent. He also argues the habeas court should have granted relief based on his DNA evidence. As stated earlier in this Opinion with respect to O'Dell's competency and innocence claims, (*see, supra*, Part V), the

arguments will be rejected.[33] Therefore, he has suffered no prejudice from the state habeas court's failure to make findings on these issues.

XXII. ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT

O'Dell claims that electrocution is cruel and unusual punishment under the Eighth Amendment. This claim seeks the creation of a new rule, and will be rejected for that reason. *Cf. Glass v. Louisiana*, 471 U.S. 1080 (1985) (Brennan, J., dissenting from denial of certiorari).

XXIII. CONCLUSION

For the reasons set forth above, the Court finds that petitioner Joseph Roger O'Dell, III, was deprived of due process and subjected to cruel and unusual punishment under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, because the trial court failed to allow petitioner to rebut the prosecutor's argument as to petitioner's future dangerousness with evidence that he would be ineligible for parole under state law. There is a reasonable probability that this constitutional error had a "substantial and injurious effect or influence" in the jury's decision to impose the death penalty. *See Brecht v. Abrahamson*, 113 S. Ct. 1710, 1721-22 (1993).

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[33] The Court did not determine whether the trial court should have revisited the subject of O'Dell's competency. This claim is barred by *Wainwright v. Sykes*. (*See, supra*, Part IV.)

The petitioner was unable to demonstrate, at the evidentiary hearing in this Court on August 2, 1994, that he is innocent of the crime such that otherwise procedurally defaulted claims should be reviewed on the merits, *see Sawyer v. Whitley*, 505 U.S. ___, 112 S. Ct. 2514 (1992), or that newly discovered DNA evidence would render the execution of petitioner unconstitutional, *see Herrera v. Collins*, 113 S. Ct. 853 (1993).

Petitioner's remaining claims will be dismissed without an evidentiary hearing.

Accordingly, the Court will grant petitioner's petition for habeas corpus filed pursuant to 28 U.S.C. § 2254, and remand the case to the Circuit Court of the City of Virginia Beach for a new sentencing proceeding.

An appropriate Final Order shall issue.

/s/ James R. Spencer
UNITED STATES
DISTRICT JUDGE

Date: SEP 6 1994

United States Court of Appeals,
Fourth Circuit.

Joseph Roger O'DELL, III,
Petitioner-Appellee,

v.

J.D. NETHERLAND, Warden, Mecklenburg Correctional Center; Ronald J. Angelone, Director, Virginia Department of Corrections; James S. Gilmore, III, Attorney General of the Commonwealth of Virginia; Commonwealth of Virginia, Respondents-Appellants.

Joseph Roger O'DELL, III,
Petitioner-Appellant,

v.

J.D. NETHERLAND, Warden, Mecklenburg Correctional Center; Ronald J. Angelone, Director, Virginia Department of Corrections; James S. Gilmore, III, Attorney General of the Commonwealth of Virginia; Commonwealth Of Virginia, Respondents-Appellees.

Nos. 94-4013, 94-4014.

Argued Dec. 5, 1995.

Decided Sept. 10, 1996.

Before WILKINSON, Chief Judge, and RUSSELL, WIDENER, HALL, MURNAGHAN, ERVIN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges.

Judge LUTTIG wrote the opinion, in which Chief Judge WILKINSON and Judges RUSSELL, WIDENER, WILKINS, NIEMEYER, and WILLIAMS joined. Judge

ERVIN wrote an opinion concurring in part and dissenting in part, in which Judges HALL, MURNAGHAN, HAMILTON, MICHAEL, and MOTZ joined.

OPINION

LUTTIG, Circuit Judge:

The United States District Court for the Eastern District of Virginia vacated the death sentence of Joseph Roger O'Dell III on federal *habeas*, holding that *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), was not a "new rule" under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and that O'Dell "was deprived of due process and subjected to cruel and unusual punishment under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, because the trial court failed to allow petitioner to rebut the prosecutor's argument as to petitioner's future dangerousness with evidence that he would be ineligible for parole under state law," J.A. at 355. The district court also denied numerous other claims of O'Dell's, including his claim that new evidence demonstrates that he is actually innocent.

Heeding the instruction of three Members of the Supreme Court that this case "should . . . receive careful consideration," *O'Dell v. Thompson*, 502 U.S. 995, 999, 112 S.Ct. 618, 620, 116 L.Ed.2d 639 (1991) (Blackmun, J., joined by Stevens and O'Connor, JJ.), both the federal district court and now the full *en banc* court have painstakingly canvassed the record, carefully considering every claim that has been advanced by petitioner. Having done so, we are convinced that O'Dell's claims are without merit and

his claim of actual innocence not even colorable. We are likewise convinced that the federal district court erred in concluding that *Simmons* did not announce a new rule. In *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), every Member of the Supreme Court apparently approved, as constitutionally permissible, the very practice later held unconstitutional in *Simmons*. The only even arguably contrary authority was a plurality opinion and a single footnote which three Members of the Court believed represented an "abandonment" of the due process holding that O'Dell now contends compelled the result in *Simmons*. In our judgment, *Simmons* was the paradigmatic "new rule." Accordingly, we affirm the district court's denial of O'Dell's secondary claims and reverse the district court's judgment granting the writ of *habeas corpus*.

I.

Over ten years ago, on Tuesday, February 5, 1985, 44-year-old Helen Schartner left the County Line Lounge in Virginia Beach around 11:30 p.m. O'Dell left the same nightclub sometime between 11:30 p.m. and 11:45 p.m. The next day, Schartner's car was found in the parking lot of the County Line Lounge, and, around 3:00 p.m., her body was found in a muddy field across the highway from the club. Tire tracks consistent with the tires on O'Dell's car were found near the body. Schartner had been killed by manual strangulation, with a force sufficient to break bones in her neck and leave finger imprints. She also had eight separate wounds on her head consistent with blows from the barrel of a handgun. About 10 days earlier, a handgun with a barrel that could

cause wounds like those found on Schartner's head had been seen in O'Dell's car. Seminal fluid was found in Schartner's vagina and anus. Enzyme tests on that fluid revealed that it was consistent with a mixture of O'Dell's and Schartner's bodily fluids. Spermatozoa also found in Schartner's genital swabs and genital scrapings were consistent with O'Dell's.

Schartner's head wounds had bled extensively. Not more than two and a half hours after Schartner left the County Line Lounge, O'Dell entered a convenience store with blood on his face, hands, hair, and clothes. Around 7:00 a.m., O'Dell called his former girlfriend, Connie Craig, and told her he had vomited blood all over his clothes and that he wanted to talk to her before he left for Florida. He then slept all day at Craig's house.

The next day, Thursday, Craig read the local newspaper account of Schartner's murder, describing how she had last been seen at the County Line Lounge. Remembering that O'Dell customarily visited the County Line Lounge on Tuesday nights, Craig went to her garage and found the paper bag that O'Dell had told her he had left, containing several articles of bloody and muddy clothing. She brought the bloody clothes into the house and called the police.

O'Dell was arrested, and, despite the contrary story he had just told Craig, told the police that the blood on his clothes came from a nose bleed caused by being struck while attempting to stop a fight at another club on the night of February 5. Electrophoretic tests on the dried blood established that the blood on O'Dell's jacket and shirt had the same enzyme markers as Schartner's, a

characteristic shared by only three out of a thousand people. O'Dell's blood did not have the same markers. Likewise, dried blood found in O'Dell's car proved consistent with Schartner's but not with O'Dell's. And, hairs found in O'Dell's car were also consistent with Schartner's, but not O'Dell's.

During his incarceration, O'Dell confessed to Steven Watson, a fellow inmate, that he had strangled Schartner after she refused to have sexual intercourse with him.

O'Dell was indicted for capital murder, abduction, rape, and sodomy. On his own motion, and after a court-appointed psychiatrist determined him competent, O'Dell quite ably defended himself *pro se*, with court-appointed attorney Paul Ray serving as standby counsel. O'Dell was tried, and, on September 10, 1986, the jury convicted him on all counts. The next day, the jury fixed his sentence for murder at death. The jury's recommendation of death was based on its finding that both of Virginia's statutory aggravating factors – future dangerousness and vileness – had been proven. J.A. at 2506. The trial judge adopted the jury's recommendation and sentenced O'Dell to death by electrocution for murder and to 40 years for rape and 40 years for sodomy. O'Dell appealed his sentence to the Supreme Court of Virginia, which affirmed the judgment of the Circuit Court. *O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491 (1988). The Virginia Supreme Court subsequently granted O'Dell's petition for rehearing in order to consider and reject a claim it had previously held to be procedurally barred, after which it again affirmed the conviction. *O'Dell v. Commonwealth*, Record No. 861219, slip op. (Va. April 1, 1988). The United States Supreme

Court denied *certiorari* on October 3, 1988. *O'Dell v. Virginia*, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988).

O'Dell filed a petition for a writ of *habeas corpus* in the Circuit Court of Virginia Beach on June 1, 1989, and an amended petition on July 3, 1990, both of which were denied. J.A. at 278-79. O'Dell attempted to appeal the denial to the Virginia Supreme Court, but he erroneously filed an "Assignments of Error" with the Supreme Court instead of a "Petition for Appeal," as required by Virginia law. O'Dell attempted to correct the error, but by then the time to file had expired and so the Virginia Supreme Court dismissed his perfected Petition for Appeal as untimely. The United States Supreme Court again denied *certiorari* on December 2, 1991, with three Justices issuing a statement respecting the denial of *certiorari*. *See O'Dell*, 502 U.S. at 995, 112 S.Ct. at 618 (Blackmun, J., joined by Stevens and O'Connor, JJ.).

O'Dell then filed this federal *habeas* petition on July 23, 1992. The district court, Judge James R. Spencer, held a full evidentiary hearing on O'Dell's claim that new DNA evidence established that he was actually innocent. The court rejected that claim, along with numerous others, but vacated O'Dell's death sentence because he had not been allowed to rebut the prosecution's future dangerousness arguments with a showing that he would be ineligible for parole. In so doing, the court held that this rule, announced in *Simmons*, was not a new rule under *Teague*. The Commonwealth of Virginia appeals this latter holding, and O'Dell cross-appeals the denial of his numerous other claims.

II.

O'Dell, born in 1941, began his criminal career at age 13 with a juvenile conviction for breaking and entering, followed by five convictions over the next three years for auto theft. By 1958, O'Dell had turned violent. In that year, he was convicted of assault three times and of threatening bodily harm once. The following year, he was convicted of attempted escape from prison. After being released from the penitentiary, he returned five months later when his probation was revoked. He was then convicted of five armed robberies and five unauthorized uses of motor vehicles and sentenced to 24 years in prison. While imprisoned, O'Dell was convicted of second degree murder. In July of 1974, O'Dell was again paroled, whereupon he went to Florida and was promptly convicted of kidnapping and robbery, committed just seven months after his release from prison. The victim in that case testified that O'Dell had struck her several times on the head with his gun, choked her, and held a cocked gun to her head in an attempt to force her to submit to sexual advances. The Florida court sentenced him to 99 years in prison, but, inexplicably, O'Dell was paroled yet again in December of 1983. Fourteen months later, Helen Schartner was murdered.

Under Virginia law, "[a]ny person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon . . . shall not be eligible for parole." Va.Code § 53.1-151(B1). O'Dell certainly appears to have had the requisite number of violent felony convictions to be ineligible for parole under Virginia law. Therefore, he

requested that he be allowed to respond to the prosecution's arguments of future dangerousness by arguing that he was parole ineligible. J.A. at 2308, 2378-79, 2385-86. As required by Virginia law, however, the trial judge neither allowed O'Dell to argue his parole ineligibility nor provided the jury with any information regarding O'Dell's ineligibility. J.A. at 2386. *See Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815, 828 (1985) ("The jury had no right to know what might happen to defendant, in terms of parole eligibility, after sentencing. During the penalty phase it was the jury's duty to assess the penalty, irrespective of considerations of parole."), *cert. denied*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 (1985). Eight years later, the Supreme Court, in *Simmons*, held that due process requires that a criminal defendant be allowed to argue his parole ineligibility to rebut prosecution arguments of future dangerousness. O'Dell seeks the benefit of the rule of *Simmons*, and the Commonwealth argues that *Simmons* announced a new rule under *Teague*.

A.

The question of whether a rule is "new" for purposes of *Teague* arises in two different circumstances: first, where, like here, a particular case is decided after petitioner's conviction becomes final, and petitioner seeks the benefit of the rule of that case; and second, where petitioner seeks the extension of longstanding precedent. *Cf. Stringer v. Black*, 503 U.S. 222, 227-28, 112 S.Ct. 1130, 1134-35, 117 L.Ed.2d 367 (1992). In both instances, the *Teague* inquiry is a threshold matter. *Graham v. Collins*, 506 U.S. 461, 466, 113 S.Ct. 892, 897, 122 L.Ed.2d 260 (1993); *Saffle v. Parks*, 494 U.S. 484, 487, 110 S.Ct. 1257, 1259, 108

L.Ed.2d 415 (1990). As the Court held in *Caspari v. Bohlen*, 510 U.S. 383, 389, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994), "if the State . . . argue[s] that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply *Teague* before considering the merits of the claim." Therefore, before turning to the merits of O'Dell's claim or attempting to define the precise contours of *Simmons*, our first inquiry *must* be whether *Simmons* announced a new rule under *Teague*. *See also Sawyer v. Smith*, 497 U.S. 227, 233-34, 110 S.Ct. 2822, 2826-27, 111 L.Ed.2d 193 (1990); *Wright v. West*, 505 U.S. 277, 310, 112 S.Ct. 2482, 2500, 120 L.Ed.2d 225 (1992) (Souter, J., concurring in the judgment). *But see Wright*, 505 U.S. at 309, 112 S.Ct. at 2499 (Kennedy, J., concurring in the judgment). As explained in *Caspari*,

> a federal court should apply *Teague* by proceeding in three steps. First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must survey the legal landscape as it then existed, and determine whether a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution. Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle.

510 U.S. at 389, 114 S.Ct. at 953 (internal quotation marks and citations omitted).

O'Dell's conviction became final on October 3, 1988, when the United States Supreme Court denied his petition for *certiorari* on direct appeal. *See O'Dell v. Virginia*, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988). Therefore, we must "survey the legal landscape" in October of 1988 to determine whether the *result* of *Simmons* (and the accompanying rule necessary to produce that result) was *dictated* by precedent existing at the time O'Dell's conviction became final. *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 ("[A] case announces a new rule if the *result* was not *dictated* by precedent existing at the time the defendant's conviction became final." (first emphasis added)). As the Supreme Court has stated repeatedly, a rule sought by a *habeas* petitioner is "new," and thus consideration of the underlying claim barred, unless reasonable jurists considering the petitioner's claim at the time his conviction became final " 'would have felt *compelled by existing precedent' to rule in his favor.*" *Graham*, 506 U.S. at 467, 113 S.Ct. at 897 (emphasis added) (quoting *Saffle*, 494 U.S. at 488, 110 S.Ct. at 1260).[1] The inquiry is not merely whether the

[1] *See also Penry v. Lynaugh*, 492 U.S. 302, 313, 109 S.Ct. 2934, 2944, 106 L.Ed.2d 256 (1989) ("[W]e must determine, as a threshold matter, *whether granting [Penry] the relief he seeks* would create a 'new rule.' " (emphasis added) (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070)); *Graham*, 506 U.S. at 472, 113 S.Ct. at 900 ("We cannot say that reasonable jurists considering petitioner's claim in 1984 would have felt that these cases *'dictated' vacatur of petitioner's death sentence.*" (emphasis added) (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070)); *id.* at 476, 113 S.Ct. at 902 ("This distinction leads us to conclude that neither *Penry* nor any of its predecessors *'dictates' the relief Graham seeks* within the meaning required by *Teague.*" (emphasis added)); *id.* at 477, 113 S.Ct. at 903 ("We cannot say that all reasonable jurists would have deemed themselves *compelled to accept Graham's claim* in 1984." (emphasis added)); *Stringer*, 503 U.S. at 228, 112 S.Ct. at 1135 (*Teague* inquiry asks *"whether granting the relief sought [by the petitioner]* would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent." (emphasis added)); *id.* at 227, 112 S.Ct. at 1135 ("[A] case decided after a petitioner's conviction and sentence became final may not be the predicate *for federal habeas corpus relief* unless the decision was dictated by precedent . . . . " (emphasis added)); *Johnson v. Texas*, 509 U.S. 350, 365, 113 S.Ct. 2658, 2667, 125 L.Ed.2d 290 (1993) ("In rejecting the contention that *Penry* dictated *a ruling in the defendant's favor* [in *Graham*], we stated that . . . . " (emphasis added)); *id.* ("We also did not accept the view that the *Lockett* and *Eddings* line of cases, upon which *Penry* rested, *compelled a holding for the defendant* in *Graham* . . . . " (emphasis added)); *id.* at 366, 113 S.Ct. at 2668 ("We concluded that, even with the benefit of the subsequent *Penry* decision, reasonable jurists at the time of Graham's sentencing 'would [not] have deemed themselves *compelled to accept Graham's claim.*' " (emphasis added) (quoting *Graham*, 506 U.S. at 477, 113 S.Ct. at 903)); *id.* ("Thus, we held that *a ruling in favor of Graham* would have required the impermissible application of a new rule under *Teague.*" (emphasis added)); *Caspari*, 510 U.S. at 389, 114 S.Ct. at 953 ("The nonretroactivity principle *prevents a federal court from granting habeas corpus relief* to a state prisoner based on a rule announced after his conviction and sentence became final." (emphasis added)).

"claim" was "predicated" on preexisting precedent or whether the "challenge" was "dictated" by such precedent; it is *in* sufficient that prior decisions "inform, or even control or govern, the analysis of" a petitioner's claim. *Saffle*, 494 U.S. at 491, 110 S.Ct. at 1262. *See also Sawyer*, 497 U.S. at 236, 110 S.Ct. at 2828 (quoting *Saffle*); *Butler v. McKellar*, 494 U.S. 407, 415, 110 S.Ct. 1212, 1217, 108 L.Ed.2d 347 (1990) (noting that a decision within the "logical compass" of an earlier decision may nonetheless announce new rule). Rather, the result of the case must

have been compelled by then-existing precedent, as even the dissenting Justices in the continuing debate over the contours of the "new rule" doctrine agree.[2]

We have suggested otherwise in several recent cases, *see, e.g., Turner v. Williams*, 35 F.3d 872 (4th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1359, 131 L.Ed.2d 216 (1995), and *Ostrander v. Green*, 46 F.3d 347 (4th Cir.1995). Both *Turner* and *Ostrander* applied broad formulations, asking

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[2] Justice Souter, for example, who authored the dissent in *Graham*, could not have been clearer as to this requirement of the "new rule" doctrine when he wrote in *Wright* that, "[t]o survive *Teague*, [a rule] must be 'old' enough to have predated the finality of the prisoner's conviction, *and specific enough to dictate the rule on which the conviction may be held to be unlawful.*" 505 U.S. at 311, 112 S.Ct. at 2500 (Souter, J., concurring in the judgment) (emphasis added); *see also id.* at 313, 112 S.Ct. at 2502 ("[I]n light of authority extant when [petitioner's] conviction became final, *its unlawfulness must be apparent.*" (emphasis added)). Justice Brennan has also acknowledged that this is the standard governing federal *habeas* review. As he stated in *Butler*, the Court in *Teague* "declared that a federal court entertaining a state prisoner's habeas petition generally may not reach the merits of the legal claim unless the court determines, as a threshold matter, that a *favorable ruling on the claim* would flow from the application of [preexisting] legal standards." 494 U.S. at 417, 110 S.Ct. at 1218-19 (Brennan, J., dissenting) (emphasis added); *see also id.* at 417-18, 110 S.Ct. at 1219 ("Put another way, a state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge *was so clearly invalid* under then-prevailing legal standards that the decision could not be defended by any reasonable jurist." (emphasis added)); *West*, 505 U.S. at 291, 112 S.Ct. at 2490 ("[A] federal habeas court 'must defer to the state court's decision rejecting the claim *unless that decision is patently unreasonable.*' " (emphasis added) (quoting *Butler*, 494 U.S. at 422, 110 S.Ct. at 1221 (Brennan, J., dissenting))).

whether prior caselaw "dictated petitioner's challenge" or whether petitioner's challenge was "predicated on" prior caselaw. Applying the first locution of whether prior precedent "dictates the challenge," alone would result in an inestimable number of cases in which federal courts would be obliged to undertake full merits review of reasonable, and in many instances unassailable, state court judgments. For in many cases that are not currently reviewable on federal *habeas*, the state court's judgment (against the petitioner) will have been dictated by existing precedent. Any cases not subject to review under the "dictates the challenge" locution would undoubtedly be subject to review under the alternative formulation that the "new rule" doctrine does not bar consideration of any claim "predicated on" prior caselaw. This formulation renders reviewable on *habeas* essentially every claim, for virtually every *habeas* petitioner necessarily "predicates" his claims on prior caselaw.

These consequences of the formulations of the "new rule" inquiry embraced in *Turner* and *Ostrander* underscore the error of those two decisions. The very purpose of *Teague* was to halt federal *habeas* review even of state court interpretations of federal law that ultimately prove *incorrect*, provided they are reasonable. Yet under the reasoning of those two cases, federal courts would be reviewing and deciding on the merits countless state court judgments that are not only reasonable but, *indisputably correct*.

Thus, both locutions discussed in *Turner* and *Ostrander* would frustrate the principles of finality, comity toward state judicial tribunals, *see Teague*, 489 U.S. at 310, 109 S.Ct. at 1075 (explaining that " '[s]tate courts are

understandably frustrated' " when federal *habeas* courts reverse their reasonable rulings on federal law) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 n. 33, 102 S.Ct. 1558, 1572 n. 33, 71 L.Ed.2d 783 (1982)), and respect for state prosecutorial authorities, *see Teague*, 489 U.S. at 310, 109 S.Ct. at 1075 (stating that federal review should not require states "to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards"), that prompted adoption of *Teague*'s "new rule" doctrine in the first place.

Therefore, *Turner* and *Ostrander* are today overruled to the extent they suggest that the bar of *Teague* is inapplicable if a petitioner's challenge is merely "predicated on" prior caselaw or if prior caselaw merely "dictates petitioner's challenge." As the Supreme Court has consistently held, extant caselaw must compel not only the challenge, but the actual relief that petitioner seeks.

The result of the case in question (here, *Simmons*) must also have been compelled *because of* the rule that the petitioner seeks. In making this determination, of course, the "rule" must be identified at the appropriately specific level of generality. The appropriate level of generality for identifying the rule is that level represented by the narrowest principle of law that was actually applied in order to decide the case in question. Thus, for example, as we held in *Townes v. Murray*, 68 F.3d 840 (4th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 831, 133 L.Ed.2d 830 (1996), the most specific principle of law applied in *Simmons*, and therefore the "rule" of *Simmons*, is "that '[w]here the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process

entitles the defendant to inform the capital sentencing jury – by either argument or instruction – that he is parole ineligible.' " *Id.* at 850 (quoting *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2201 (O'Connor, J., concurring in the judgment)). To frame the rule more broadly – for example, as that of "due process" or "the right to be heard" or generally as "the right to rebut the State's arguments" or "the need for reliability in capital sentencing" – would vitiate *Teague*. As the Chief Justice explained for the Court recently in *Gray v. Netherland*, ___ U.S. ___, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996), for example,

> The dissent argues that petitioner seeks the benefit of [*Gardner*'s] well-established rule, that "a capital defendant must be afforded a meaningful opportunity to explain or deny the evidence introduced against him at sentencing." . . . But . . . the new-rule doctrine "would be meaningless if applied at this level of generality."

Id. at ___, 116 S.Ct. at 2084 (quoting *Sawyer*, 497 U.S. at 236, 110 S.Ct. at 2828); *see also Sawyer*, 497 U.S. at 236, 110 S.Ct. at 2828 ("In petitioner's view, *Caldwell* [v. *Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985),] was dictated by the principle of reliability in capital sentencing. *But the test would be meaningless if applied at this level of generality.*" (emphasis added) (citing *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987), with the following parenthetical: "[I]f the test of 'clearly established law' were to be applied at this level of generality, . . . [p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract

rights."). (emphasis added); *Gilmore v. Taylor*, 508 U.S. 333, 344, 113 S.Ct. 2112, 2119, 124 L.Ed.2d 306 (1993); *Wright*, 505 U.S. at 311-12, 112 S.Ct. at 2500-01 (Souter, J., concurring in the judgment).

As the Supreme Court's repeated analogy to the qualified immunity analysis confirms, the new rule analysis fundamentally asks the same question as does the qualified immunity analysis – whether a contrary conclusion would have been *objectively unreasonable*. *Cf. Hogan v. Carter*, 85 F.3d 1113, 1996 WL 292031 at *4 n. 3 (4th Cir.) (*en banc*); 28 U.S.C. § 2254(d)(1) (as amended April 24, 1996). The varying formulations for the new rule test that have, from time to time, been employed by the Court[3] are but myriad faces of the same basic inquiry: whether it would have been objectively unreasonable, under the law existing at that time, for a judge to reach a contrary result

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[3] *See, e.g., Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 ("In general, . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."); *Penry*, 492 U.S. at 314, 329, 109 S.Ct. at 2944, 2952 (quoting *Teague*); *Butler*, 494 U.S. at 412, 110 S.Ct. at 1216 (citing *Penry*); *Saffle*, 494 U.S. at 488, 110 S.Ct. at 1260 (quoting *Teague*); *Graham*, 506 U.S. at 467, 113 S.Ct. at 897 (quoting *Teague*); *see also Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 ("To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."); *Penry*, 492 U.S. at 314, 109 S.Ct. at 2944 (quoting *Teague*); *Butler*, 494 U.S. at 412, 110 S.Ct. at 1216 (quoting *Penry* (quoting *Teague*)); *Saffle*, 494 U.S. at 488, 110 S.Ct. at 1260 (quoting *Teague*); *Sawyer*, 497 U.S. at 234, 110 S.Ct. at 2827 (quoting *Teague*); *Graham*, 506 U.S. at 467, 113 S.Ct. at 897 (quoting *Teague*); *Gilmore*, 508 U.S. at 340, 113 S.Ct. at 2116 (quoting *Butler* (quoting *Penry* (quoting *Teague*))); *Caspari*, 510 U.S. at 389, 114 S.Ct. at 953 (quoting *Teague*).

to that subsequently reached. As the Court explained in *Butler*, 494 U.S. at 414, 110 S.Ct. at 1217, "[t]he 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *See also Graham*, 506 U.S. at 467, 113 S.Ct. at 897 (quoting *Butler*, 494 U.S. at 414, 110 S.Ct. at 1217). The question is "whether a state court considering [petitioner's] claim at the time his conviction became final would have felt *compelled* by existing precedent to conclude that the rule [petitioner] seeks was *required* by the Constitution." *Saffle*, 494 U.S. at 488, 110 S.Ct. at 1260 (emphasis added); *see also Graham*, 506 U.S. at 467, 113 S.Ct. at 897. Whenever the "outcome" of a case was "susceptible to debate among reasonable minds," *Butler*, 494 U.S. at 415, 110 S.Ct. at 1217, or among "reasonable jurists," *Sawyer*, 497 U.S. at 234, 110 S.Ct. at 2827, then that case announced a new rule. *See also Butler*, 494 U.S. at 417-18, 110 S.Ct. at 1218-19 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting) ("[A] state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge was *so* clearly invalid under then-prevailing legal standards that the *decision could not be defended by any reasonable jurist.*" (second emphasis added)); *Graham*, 506 U.S. at 467, 476, 113 S.Ct. at 897, 902; *Stringer*, 503 U.S. at 238, 112 S.Ct. at 1140 (Souter, J., dissenting).

B.

As noted, the narrowest principle of law that was applied in order to decide *Simmons* was that applied by Justice O'Connor in her separate concurrence: "[w]here

the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury – by either argument or instruction – that he is parole ineligible." 512 U.S. at ___, 114 S.Ct. at 2201 (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., concurring in the judgment). Therefore, unless it would have been objectively unreasonable for a state court in 1988 (when O'Dell's conviction became final) to conclude that the Constitution did not require that the jury be informed of parole ineligibility, *Simmons* must be held to have announced a new rule.

"Surveying the legal landscape" in 1988, *Graham*, 506 U.S. at 468, 113 S.Ct. at 898, a reasonable jurist would have been faced with the following caselaw. First, that jurist would have been confronted with the cases upon which *Simmons* principally relied, *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). In *Gardner*, the Court vacated a death sentence because the sentencing court had relied in part on a secret presentence report that the defendant never had an opportunity to see or to rebut. The three-Justice plurality concluded that "petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." 430 U.S. at 362, 97 S.Ct. at 1206 (Stevens, J., joined by Stewart and Powell, JJ.). Under *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977), however, the holding of *Gardner* is the "position taken by those Members who concurred in

the judgment[ ] on the narrowest grounds"; therefore, the holding of *Gardner* is found in Justice White's opinion, in which he concurred in the judgment on the narrow and fact-specific ground that reliance upon *secret* information in sentencing a man to death violates the Eighth Amendment – although not necessarily due process. *Gardner*, 430 U.S. at 364, 97 S.Ct. at 1207 (White, J., concurring in the judgment).

In 1988, a reasonable jurist would also have considered *Skipper*, where the Court vacated a death sentence because, in violation of the Eighth Amendment rule of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the jury had been prevented from hearing the defendant's evidence of previous good behavior in jail. *Skipper*, 476 U.S. at 4, 106 S.Ct. at 1670. Specifically, the Court held that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating," and that "[u]nder *Eddings*, such evidence may not be excluded from the sentencer's consideration." *Id.* at 5, 106 S.Ct. at 1671.

The sole question upon which *certiorari* was granted in *Skipper* was whether, under the Eighth Amendment, the lower court's decision was "inconsistent with th[e] Court's decisions in *Lockett* and *Eddings*." *Id.* at 4, 106 S.Ct. at 1670. And the Court noted that this Eighth Amendment issue was "the only question before [it]." *Id.* One footnote in *Skipper*, however, read as follows:

> The relevance of evidence of probable future conduct in prison as a factor in aggravation or mitigation of an offense is underscored in this

particular case by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison. Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197, 1207, 51 L.Ed.2d 393 (1977).

Id. at 5 n. 1, 106 S.Ct. at 1671 n. 1. In addition to this footnote, which provides the strongest suggestion that the due process rule announced in *Simmons* was not new, three Justices also joined a separate opinion concluding that, although Skipper's death sentence did not violate the Eighth Amendment under *Lockett* and *Eddings*, it did violate due process under *Gardner*. *Id.* at 9, 106 S.Ct. at 1673 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment).

Were *Gardner* and *Skipper* the totality of the "legal landscape" in 1988, the claim that *Simmons* was not a new rule might, at least at first blush, have considerable force.

Of critical significance, however, in addition to *Gardner* and *Skipper*, a reasonable jurist in 1988 would also have confronted *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), in which the Court not

only held that a defendant was *not* constitutionally entitled to apprise the jury of the Governor's power to commute a death sentence (when the trial court had already instructed the jury of the Governor's power to commute a life sentence without parole), but also expressly noted with approval the practices in many states of forbidding any reference to the possibility of pardon, commutation, or parole.

In *Ramos*, the Court upheld the constitutionality of a death sentence under the Eighth and Fourteenth Amendments,[4] where the jury had been instructed, as required by state statute, that the Governor possessed the power to commute a sentence of life imprisonment without possibility of parole. Justice O'Connor, writing for the Court, repeatedly emphasized that, with only a few exceptions,

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[4] To be sure, the Court's decision in *Ramos* rested primarily on the Eighth Amendment. But the Court specifically considered, *inter alia*, whether the Briggs Instruction ran afoul of the due process concerns of reliability in sentencing that were identified in *Gardner*, concluding that *Gardner* "provid[ed] no support for respondent." 463 U.S. at 1004, 103 S.Ct. at 3455. Indeed, it concluded its opinion by reiterating its earlier determinations that the instruction "[did] not violate any of the substantive limitations this Court's precedents have imposed on the capital sentencing process," *id.* at 1013, 103 S.Ct. at 3460, including those identified in *Gardner*, *see id.* at 1000-01, 103 S.Ct. at 3452-53.

Regardless, it was apparent in 1988, as it is still today, that the Eighth Amendment's principles inform the Due Process capital sentencing inquiry. Therefore, a reasonable jurist could hardly be faulted either for resorting to both lines of the Court's cases, as the Court itself has repeatedly done, or for relying only on the line directly implicated in the case before him.

"the Court has deferred to the State's choice of substantive factors relevant to the penalty determination." *Id.* at 1001, 103 S.Ct. at 3453. The Court invoked *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), to make the point, noting that "the joint opinion [in *Gregg*] did not undertake to dictate to the State the particular *substantive* factors that should be deemed relevant to the capital sentencing decision," *Ramos*, 463 U.S. at 999, 103 S.Ct. at 3452 (emphasis in original), and then quoting *Gregg*'s observation that the guidance that should be given the jury in making its sentencing determination is that " *'that the State, representing organized society, deems particularly relevant to the sentencing decision,'* " *id.* at 1000, 103 S.Ct. at 3453 (quoting *Gregg*, 428 U.S. at 192, 96 S.Ct. at 2934) (emphasis added by *Ramos* Court).

Importantly, the Court in Ramos also squarely rejected an argument by petitioner that was virtually indistinguishable in principle from that made by petitioner in Simmons. Ramos argued that an instruction as to the Governor's power to commute a death sentence was required under "basic principles of fairness," because, otherwise, the court's instruction that the Governor could commute a life sentence, "create[d] the misleading impression that the jury can prevent the defendant's return to society only by imposing the death sentence," *id.* at 1010-11, 103 S.Ct. at 3458-59, just as Simmons argued that an instruction to the jury as to his parole ineligibility was required to eliminate the mistaken impression that only by imposing death could the jury prevent his return into society. As the Court explained petitioner's argument in *Simmons:*

> Petitioner argued that, in view of the public's misunderstanding about the meaning of "life imprisonment" in South Carolina, there was a reasonable likelihood that the jurors would vote for death simply because they believed, mistakenly, that petitioner eventually would be released on parole.

512 U.S. at ___, 114 S.Ct. at 2191. Notwithstanding, the Court dismissed Ramos' argument on the ground, *inter alia*, that the entire instruction "satisfies the *Jurek* [v. *Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976),] requirement that '[w]hat is essential is that the jury have before it all possible relevant information *about the individual defendant* whose fate it must determine.' " *Ramos*, 463 U.S. at 1012 n. 29, 103 S.Ct. at 3459 n. 29 (quoting *Jurek*, 428 U.S. at 276, 96 S.Ct. at 2958) (emphasis added). Justice Marshall in dissent in *Ramos* even criticized the majority's rejection of this instruction on precisely the same grounds that the *Simmons* Court ultimately employed in requiring an instruction as to parole ineligibility:

> The Briggs Instruction may well mislead the jury into believing that it can eliminate any possibility of commutation by imposing the death sentence. It indicates that the Governor can commute a life sentence without possibility of parole, but not that the Governor can also commute a death sentence. *The instruction thus erroneously suggests to the jury that a death sentence will assure the defendant's permanent removal from society whereas the alternative sentence will not.*
>
> Presented with this choice, a jury may impose the death sentence to prevent the Governor from exercising his power to commute a life sentence without possibility of parole.

Ramos, 463 U.S. at 1016, 103 S.Ct. at 3461 (Marshall, J., dissenting) (citations and footnote omitted, emphasis added). *Compare Simmons*, 512 U.S. at ___, 114 S.Ct. at 2193 ("In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration.").[5]

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[5] Indeed, one federal district court rejected a pre-*Simmons* claim very much like that in *Simmons* on precisely this ground:

> While *Ramos* did not address the precise issue raised here, it is instructive. . . . The Briggs Instruction [reviewed in *Ramos*] informed the jury that a sentence of life imprisonment without parole may be commuted by the governor to a sentence that includes the possibility of parole. The jury in *Ramos* was not told that the governor could similarly commute a sentence of death to a lesser punishment. The California Supreme Court reversed the death sentence, in part because this combination of instructions allowed the jury to believe mistakenly that the "only way to keep the defendant off the streets is to condemn him to death." The instructions given . . . [here] could also produce this misapprehension in jurors: telling the jury that the alternative to death is imprisonment might lead it to believe that public safety would be assured only through the imposition of the death penalty. Despite this concern, the Supreme Court upheld the constitutionality of the Briggs Instruction in *Ramos*, finding that it did not preclude individualized sentencing determination or introduce a speculative element in jury deliberation. . . . In light of *Ramos*, [petitioner's] appeal to the general principle that imposition of capital punishment must be based on reason, rather than emotion and caprice, is an insufficient basis on which to grant relief. All constitutional rules can be stated in very general terms, but general principles do not compel specific rules.

Albanese v. McGinnis, 823 F.Supp. 521, 565-66 (N.D.Ill.1993) (citations and footnote omitted), *aff'd* 19 F.3d 21 (7th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1114, 130 L.Ed.2d 1078 (1995).

Although the *Ramos* Court noted that it considered it desirable for the jury to have this information concerning the Governor's power to commute a death sentence, and as much other information as possible during sentencing, 463 U.S. at 1009 n. 23, 103 S.Ct. at 3458 n. 23, it nevertheless found that the trial court's refusal to inform the jury of the Governor's power to commute the death sentence (while at the same time informing it of his power to commute life imprisonment) was in no way unconstitutional, *see id.* at 1013, 103 S.Ct. at 3460 ("[The State's] failure to inform the jury also of the Governor's power to commute a death sentence does not render it constitutionally infirm.").

No doubt, a reasonable jurist in 1988, considering whether the Constitution necessarily required the rule of *Simmons*, would also have focused immediately upon the broad principles of deference to state decisions regarding the substantive factors that juries may consider during sentencing, which underlay the Court's decision to uphold California's choice to inform the jury of the Governor's power to commute a life sentence but not his power to commute a death sentence. In punctuation of this principle, the Court concluded its entire opinion as follows:

In sum, the Briggs Instruction does not violate any of the substantive limitations this Court's precedents have imposed on the capital sentencing process. It does not preclude individualized sentencing determinations or consideration of mitigating factors, nor does it impermissibly inject an element too speculative for the jury's deliberation. Finally, its failure to inform the jury also of the Governor's power to commute a death sentence does not render it constitutionally infirm. *Therefore, we defer to the State's* identification of the Governor's power to commute a life sentence as a *substantive factor* to be presented for the sentencing jury's consideration.

> Our conclusion is *not intended to override the contrary judgment of state legislatures* that capital sentencing *juries in their States should not be permitted to consider* the Governor's power to commute a sentence. . . . We sit as judges, not as legislators, and *the wisdom of the decision to permit juror consideration of possible commutation is best left to the States.*

Id. at 1013-14, 103 S.Ct. at 3459-60 (footnote omitted) (emphasis added).

Even more so, that jurist would have fixed immediately upon footnote 30 within this concluding passage. As Justice O'Connor, the author of *Ramos* and the necessary fifth vote in *Simmons*, observed in *Simmons* itself, *see* 512 U.S. at ___, 114 S.Ct. at 2200 (O'Connor, J., concurring in the judgment) (emphasis added), *Ramos* "noted *with approval*" that,

> [m]any state courts have held it improper for the jury to consider or to be informed – through

> argument or instruction – of the possibility of commutation, pardon, *or parole.*

Ramos, 463 U.S. at 1013 n. 30, 103 S.Ct. at 3460 n. 30 (emphasis added). In that footnote passage in *Ramos*, the Court even cited "with approval" a Georgia statute "prohibiting argument as to the possibility of pardon, parole, or clemency," and numerous state cases holding, for example, that " '[a]ny consideration of the possibility of parole as such simply is *irrelevant,*' " and that "consideration of parole [is] outside [the] proper scope of jury's duty as fixed by statute." *Id.*

In fact, not only the majority, but the full Court, recognized and approved, as constitutionally permissible, the practice of "nearly every jurisdiction which has considered the question" of not "permitt[ing] [juries] to consider commutation *and parole.*" *Id.* at 1025, 103 S.Ct. at 3466 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.) (emphasis added); *see also id.* at 1029, 103 S.Ct. at 3468 (Stevens, J., dissenting). The dispute between the majority and the dissenters was whether the States could *ever* allow the jury to consider matters such as commutation, pardons or parole. The majority concluded that the decision to allow jury consideration of these matters should be left to the discretion of the States, but the dissenters went even further, arguing that States should *never* be allowed to permit instruction or argument to the jury concerning commutation, pardon, or parole:

> The [Briggs] [I]nstruction invites juries to impose the death sentence to eliminate the possibility of eventual release through commutation and parole. Yet that possibility bears no relation

to the defendant's character or the nature of the crime, or to any generally accepted justification for the death penalty. . . . *In my view, the Constitution forbids the jury to consider any factor which bears no relation to the defendant's character or the nature of his crime, or which is unrelated to any penological objective that can justify imposition of the death penalty. Our cases establish that a capital sentencing proceeding should focus on the nature of the criminal act and the character of the offender.* . . . Considerations such as the extent of premeditation, the nature of the crime, and any prior criminal activity have been considered relevant to the determination of the appropriate sentence. . . . *[T]he mere possibility of a commutation "is wholly and utterly foreign to" the defendant's guilt and "not even remotely related to" his blameworthiness.* That possibility bears absolutely no relation to the nature of the offense or the character of the individual. . . . The possibility of commutation has no relationship to the state purposes that this Court has said can justify the death penalty.

Id. at 1021-23, 103 S.Ct. at 3464-65 (Marshall, J., dissenting) (emphasis added, footnotes and citations omitted).

Looking to the actual practice in the several states as support for his argument, Justice Marshall continued:

> The propriety of allowing a sentencing jury to consider the power of a Governor to commute a sentence *or of a parole board to grant parole* has been considered in 28 jurisdictions in addition to California. Of those jurisdictions, 25 have concluded, as did the California Supreme Court in this case, that the *jury should not consider the possibility of pardon, parole, or commutation.*

Id. at 1026, 103 S.Ct. at 3466 (emphasis added, footnotes omitted). And, as support for the proposition that "in those States which formerly permitted jury consideration of parole and commutation the trend has been to renounce the prior decisions," Justice Marshall cited the very same Georgia statute cited by the majority in footnote 30 as "forbidding any jury argument concerning commutation *or parole.*" *Id.* at 1027 & n. 16, 103 S.Ct. at 3467 & n. 16 (referencing Ga.Code Ann. s 27-2206 (1972), the precursor to Ga.Code Ann. 17-8-76) (emphasis added). Even more strikingly, Justice Marshall cited *Clanton v. Commonwealth*, 223 Va. 41, 286 S.E.2d 172 (1982), which affirmed a trial court's refusal to answer the jury's question as to whether the capital defendant would be eligible for parole and which reaffirmed *Hinton v. Commonwealth*, 219 Va. 492, 247 S.E.2d 704 (1978), and *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980), both of which were expressly relied upon by the trial court below to deny O'Dell's request that he be allowed to argue parole ineligibility to the jury, J.A. at 2378-79, 2382-85. *See Ramos*, 463 U.S. at 1026 n. 13, 103 S.Ct. at 3466 n. 13 (Marshall, J., dissenting); *see also id.* (citing *Summers v. State*, 86 Nev. 210, 467 P.2d 98, 100 (1970) ("reaffirming *Serrano v. State*, 84 Nev. 676, 447 P.2d 497 (1968), *which instructed [the] jury to assume that life without parole means exactly that*") (parenthetical from *Ramos*, emphasis added)).[6]

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[6] Justice Marshall was relying primarily, although not exclusively, on the Eighth Amendment for his conclusion that the Constitution forbids any reference to the possibility of parole. It was, however, at the very least reasonable for state

In hindsight, and particularly in the wake of *Simmons*, it might be suggested that the Court in *Ramos* was expressing approval only of those state laws forbidding reference to the affirmative possibility of parole, and not of those prohibiting reference to the legal *im* possibility of parole, although to our knowledge that has never been suggested, and petitioner does not do so here. We believe, however, that, even with the Court's observation that "States are free to provide greater protections in their criminal justice system than the Federal Constitution requires," 463 U.S. at 1013-14, 103 S.Ct. at 3460, such a suggestion would border on the disingenuous, considering that the very state sentencing law that the Court was reviewing in *Ramos*, like numerous other states' laws then in effect and of which the Court was aware,[7] provided for

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jurists to have concluded that the Due Process Clause did not require what Justice Marshall believed the Eighth Amendment forbade, particularly given the majority's position that such matters are properly committed to the discretion of the individual states.

[7] *See, e.g.*, Ala.Code § 13A-5-46(e); Ark.Code Ann. 5-4-603(b); Cal. Pen.Code § 190.3; Conn. Gen.Stat. § 53a-46a(f); Del.Code Ann. tit. 11, § 4209(a); La.Code Crim. Proc. Ann. art. 905.6; Mo. Ann. Stat. § 565.030.4; N.H.Rev.Stat. Ann. § 630:5(IV); Pa. Stat. Ann. tit. 61, § 331.21; Va.Code § 53.1-151(B1); Wash. Rev.Code Ann. § 10.95.030(1). The Court had been aware of similar laws for at least a decade. *See Schick v. Reed*, 419 U.S. 256, 267 & n. 7, 95 S.Ct. 379, 385 & n. 7, 42 L.Ed.2d 430 (1974) (noting that " 'no-parole' condition attached to the commutation of [petitioner's] death sentence is similar to sanctions imposed by legislatures such as mandatory minimum sentences or statutes otherwise precluding parole" and citing 21 U.S.C. § 848(c); Mass. Gen. Laws Ann., c. 265, § 2 (1970); and Nev.Rev.Stat., Tit. 16, c. 200.030, § 6, c. 200.363, § 1(a) (1973)).

"life without possibility of parole" as the only alternative to death, *id.* at 994-95, 103 S.Ct. at 3449-50, and the Court nonetheless chose the broad, categorical language that it did, without even a hint that it intended such a distinction. Indeed, Justice O'Connor's concurrence in the *Simmons* judgment, *"despite [the Court's] general deference to state decisions regarding what the jury should be told about sentencing,"* 512 U.S. at ___, 114 S.Ct. at 2201 (emphasis added) – an explicit reference to her opinion for the Court in *Ramos* and to the discussion at pages 1013-14 and n. 30, 103 S.Ct. at page 3460 and n. 30 in particular, *see id.* at ___, 114 S.Ct. at 2200 – all but confirms that the Court intended no such distinction in *Ramos*. And, of course, the reasoning of the *Ramos* dissent – that the jury should be forbidden from considering anything beyond the particular defendant's character and his crime – which Justice Blackmun, the author of the plurality in *Simmons*, expressly joined, would not even admit such a distinction.

The question, in any event, is not whether in fact the Court in this passage was limiting its approval to those state laws prohibiting reference to the possibility that the defendant might become parole eligible. The only question is whether it would have been objectively unreasonable for jurists not to read the passage as so limited. It would be the height of pedanticism to suggest that *it would have been objectively unreasonable* for the 1988 jurist to have understood the passage as extending to all state laws prohibiting comment on parole, including those prohibiting comment as to parole ineligibility. Both the majority's and the dissent's language unquestionably swept broadly, suggesting no distinction whatsoever.

And *Ramos'* holding that the State of California was not constitutionally required to inform the jury that the Governor could also commute a death sentence, in the face of petitioner's argument that not to do so left the jury with the belief that it could prevent his return to society only by sentencing him to death, would have been analytically indefensible had the Court there drawn such a distinction. Even in *Simmons*, which ultimately constitutionalized this very distinction, not a single Justice so much as suggested that the distinction had actually been drawn in *Ramos*, ten years earlier. Under these circumstances, to suggest now that the distinction was made then, and that the several states were objectively unreasonable in not divining it at the time, would be not only demoralizing to the state and lower courts, but also destructive of the principles of comity and finality that inspired the "new rule" doctrine to begin with.

Finally, although the Supreme Court itself seemed to consider *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), wholly irrelevant to the question decided in *Simmons*,[8] the reasonable jurist in 1988

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[8] The Court did not so much as cite *Caldwell* in *Simmons*, foreclosing any argument (which O'Dell does not make, in any event) that *Caldwell* somehow compelled the result in *Simmons*. Presumably, *Simmons* did not neglect *Caldwell* merely because that case was decided under the Eighth Amendment, considering the Court's liberal reliance upon Eighth Amendment cases elsewhere in the *Simmons* opinions and its routine cross-pollenization between its Eighth Amendment and its Due Process lines of cases in the capital sentencing context. Almost certainly, the Court avoided relying on *Caldwell* because it considered that case as limited to the affirmative provision of inaccurate information as to the proper role of the jury, as the

would have at least perused that case as well. In *Caldwell*, the prosecutor had argued to the jury that it would not be finally responsible for the imposition of a death penalty because its decision would automatically be reviewed by the state's Supreme Court. The Mississippi Supreme Court rejected Caldwell's claim that such an argument violated the Eighth Amendment, concluding that, " '[b]y [*Ramos'*] reasoning, states may decide whether it is error to mention to jurors the matter of appellate review.' " *Id.* at 326, 105 S.Ct. at 2637 (quoting *Caldwell v. State*, 443 So.2d 806, 813 (Miss.1983)). The Supreme Court reversed, with a plurality of the Court characterizing as "too broad a view of *Ramos*" Mississippi's reading of that case as

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Court had expressly held in 1986. *Darden v. Wainwright*, 477 U.S. 168, 183 n. 15, 106 S.Ct. 2464, 2472 n. 15, 91 L.Ed.2d 144 (1986); *see infra* note 9; *see also Sawyer*, 497 U.S. at 233, 110 S.Ct. at 2826 (describing *Caldwell* as having held that "the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere"); *Dugger v. Adams*, 489 U.S. 401, 407, 109 S.Ct. 1211, 1215, 103 L.Ed.2d 435 (1989) ("[I]f the challenged instructions accurately described the role of the jury under state law, there is no basis for a *Caldwell* claim. To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law."). As the Chief Justice concluded for the Court in *Romano v. Oklahoma*, 512 U.S. 1, ___, 114 S.Ct. 2004, 2010, 129 L.Ed.2d 1 (1994):

> The infirmity identified in *Caldwell* is simply absent in this case: Here the jury was not affirmatively misled regarding its role in the sentencing process. The evidence at issue was neither false at the time it was admitted, nor did it even pertain to the jury's role in the sentencing process.

"[holding] that States are free to expose capital sentencing juries to any information and argument concerning postsentencing procedures." 472 U.S. at 335, 105 S.Ct. at 2643. Rather, the plurality explained, the Court upheld the instruction in *Ramos* because it was accurate and relevant to a legitimate penological objective. *Id.* And on this basis, the *Caldwell* plurality distinguished the prosecutor's argument there before it:

> In contrast [to the instruction in *Ramos*], the argument at issue here cannot be said to be either accurate or relevant to a valid penological interest. The argument was inaccurate, both because it was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform. Similarly, the prosecutor's argument is not linked to any arguably valid sentencing consideration.

Id. at 336, 105 S.Ct. at 2643.

Significantly, Justice O'Connor joined the judgment and the opinion of the Court, *except that part in which Justice Marshall, in what consequently was only a plurality, discussed Ramos and the appropriateness of states allowing their juries to consider matters such as postsentencing appellate review. Id.* at 341, 105 S.Ct. at 2646 (O'Connor, J., concurring in part and concurring in the judgment). While Justice O'Connor agreed with the plurality that the prosecutor's argument was inaccurate and misleading, and therefore violative of the Eighth Amendment, she disagreed with the plurality's conclusion regarding the complete irrelevancy to the sentencing decision of information concerning appellate review. Justice Marshall had

observed for the plurality, adopting the same position that he had articulated in dissent in *Ramos*, that the availability of appellate review "is simply a factor that in itself is wholly irrelevant to the determination of the appropriate sentence." *Id.* at 336, 105 S.Ct. at 2643. But Justice O'Connor's opinion, which, as the Court held in *Romano*, 512 U.S. at ___, 114 S.Ct. at 2010, "is controlling" under *Marks*, defended her majority position in *Ramos* and reaffirmed that the Constitution does not prohibit a jury from receiving *accurate* information as to state postsentencing law:

> The Court correctly observes that *Ramos* does not imply that "States are free to expose capital sentencing juries to *any* information and argument concerning post-sentencing procedures" no matter how inaccurate. Certainly, a misleading picture of the jury's role is not sanctioned by *Ramos*. But neither does *Ramos* suggest that the Federal Constitution prohibits the giving of accurate instructions regarding post-sentencing procedures.

Caldwell, 472 U.S. at 342, 105 S.Ct. at 2646 (O'Connor, J., concurring in part and concurring in the judgment) (citations omitted; emphasis added).

And critically as it bears on whether *Simmons* was required in the face of *Ramos*, Justice O'Connor specifically addressed herself to the "inaccuracy and unreliability" that results not from *affirmatively* providing false information, but merely from the *failure to disabuse* jurors of every misconception they might have about the

state's post-sentencing processes – the very kind of "inaccuracy and unreliability" that the Court eventually held required the rule in *Simmons:*

> Jurors may harbor misconceptions about the power of state appellate courts or, for that matter, *this* Court to override a jury's sentence of death. Should a State conclude that the reliability of its sentencing procedure is enhanced by accurately instructing the jurors on the sentencing procedure, including the existence and limited nature of appellate review, I see nothing in *Ramos* to foreclose a policy choice in favor of jury education.

Caldwell, 472 U.S. at 342, 105 S.Ct. at 2646. *Compare Simmons*, 512 U.S. at ___, ___, 114 S.Ct. at 2191, 2193. Of course, saying that the states may choose, as a matter of policy, to attempt to eliminate any pre-existing juror misconceptions about post-sentencing procedures is necessarily to say that they are not constitutionally required to do so.

In sum, *Caldwell* would have appeared to the reasonable jurist as simply another chapter in the continuing debate on the Court over the extent to which states should be allowed discretion over whether to inform their juries of state post-sentencing laws and procedures – a chapter in which the Court, per Justice O'Connor, reconfirmed the broad discretion retained by the states over whether to apprise juries of state post-sentencing laws. In *Ramos*, for five Members of the Court, and again

in *Caldwell* for four, but effectively five,[9] Justice O'Connor concluded that the states should be afforded the widest possible discretion; and in *Ramos*, and again in *Caldwell*, Justice Marshall argued for four Members of the Court that they should be allowed none at all. But both sides of the Court agreed, in both *Ramos* and *Caldwell*, that should the states choose to provide information as to post-sentencing laws and procedures, they cannot affirmatively mislead the jury as to those laws and procedures.

C.

A reasonable jurist in 1988, thus, would have found himself in something of a quandary. Footnote one of *Skipper*, in combination with the plurality opinion in *Gardner*, at least suggested that due process might compel the rule in *Simmons*. However, the holding, reasoning, and express language of *Ramos*, and in particular the text at and of footnote 30, seemed to render it all but a certainty that the rule of *Simmons* was not only not compelled, but forbidden – a conclusion only reinforced by the *Ramos* dissenters and by *Caldwell*. As even the *Simmons* plurality recognized, the "States that do not provide

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[9] Justice Powell took no part in the consideration of *Caldwell*, so it might appear that only the three *Caldwell* dissenters agreed with Justice O'Connor. However, Justice Powell joined Justice O'Connor's majority opinion in *Ramos*, and, as he said for the majority in *Darden v. Wainwright*, decided only one year after *Caldwell*, "*Caldwell* is relevant only to certain types of comment – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." 477 U.S. at 183 n. 15, 106 S.Ct. at 2472 n. 15.

capital-sentencing juries with any information regarding parole ineligibility seem to rely . . . on the proposition that *Ramos* held that such determinations are purely matters of state law." *Simmons*, 512 U.S. at ___ & n. 8, 114 S.Ct. at 2195-96 & n. 8 (*citing the decision of the Virginia Supreme Court on O'Dell's direct appeal*).

1.

Since the reasonable state or federal lower court jurist was not at liberty to ignore either *Gardner/Skipper* or *Ramos/Caldwell*, and since the Supreme Court apparently viewed these cases as all compatible – it having not overruled *Gardner* in *Ramos* or *Caldwell*, nor *Ramos* and *Caldwell* in *Skipper* – that jurist would have been obliged to reconcile these cases by finding some "meaningful[ ] distin[ction]" between them, *see Wright*, 505 U.S. at 304, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment). Upon examining the cases, an entirely reasonable distinction would have suggested itself – a distinction of *Gardner* and *Skipper*, on the one hand, from *Ramos* and *Caldwell* on the other, much like the distinction the Court drew in *Saffle* between the rule of *Lockett* and *Eddings* (the key precedents underlying *Skipper*), and the rule that Parks was there urging. In *Saffle*, the Court concluded that *Lockett* and *Eddings* "place clear limits on the ability of the State to define the *factual* bases upon which the capital sentencing decision must be made." *Saffle*, 494 U.S. at 490, 110 S.Ct. at 1261 (emphasis added) (citing *Skipper*, with the following parenthetical: "exclusion of evidence regarding defendant's post-offense *conduct*" (emphasis added)). The Court then contrasted that rule

with petitioner's proposed rule that states could not constitutionally prohibit juries from sentencing based upon sympathy and empathy:

> Parks asks us to create a rule relating, not to *what* mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to *how* it must consider the mitigating evidence. There is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision. We thus cannot say that the large majority of federal and state courts that have rejected challenges to anti-sympathy instructions similar to that given at Parks' trial have been unreasonable in concluding that the instructions do not violate the rule of *Lockett* and *Eddings*.

Id.

As *Saffle* distinguished between *Lockett*'s and *Eddings*' rule as to *what* mitigating evidence the jury may consider, from Park's proposed rule as to *how* the jury may consider that evidence, so also a jurist in 1988 could reasonably have distinguished *Gardner*'s and *Skipper*'s rule as to the defendant's right to rebut prosecution claims with *factual* evidence, from *Ramos*' rule (and *Simmons*' rule) as to the defendant's right to rebut prosecution claims with arguments from state *law*.

That is, a reasonable jurist could have concluded that the due process principle of *Gardner* and *Skipper* was that a trial court could not deny a capital defendant the opportunity to rebut arguments made by the State with

relevant *factual evidence* about himself, his character, and his particular offense.Thus, the Court required the secret presentence report in *Gardner*, which provided "factual information" upon which the judge relied in sentencing Gardner to death, *Gardner*, 430 U.S. at 353, 97 S.Ct. at 1202 (plurality); *id.* at 364, 97 S.Ct. at 1208 (White, J., concurring in the judgment) ("secret information relevant to the 'character and record of the individual offender' "), be made known to the defendant so that he could attempt to rebut it with contrary "factual information." *See also id.* at 360, 97 S.Ct. at 1205 (plurality) ("Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us . . . to recognize the importance of giving counsel an opportunity to comment on *facts* which may influence the sentencing decision in capital cases." (emphasis added)). And, thus, the prosecution's argument in *Skipper* that the defendant would pose a future danger and would "likely rape other prisoners," *Skipper*, 476 U.S. at 3, 106 S.Ct. at 1670, necessitated that the defendant be allowed to rebut this argument with evidence of his "past conduct," *id.* at 5, 106 S.Ct. at 1671, namely good behavior while previously incarcerated. As the Court emphasized at the outset of its opinion in *Skipper*,

> [t]here is no disputing that this Court's decision in *Eddings* requires that in capital cases " 'the sentencer . . . not be precluded from considering, *as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that defendant proffers as a basis for a sentence less than death.*' " Equally clear is the corollary rule that the sentencer may

> not refuse to consider or be precluded from considering "any relevant mitigating evidence."

Id. at 4, 106 S.Ct. at 1670-71 (citations omitted, emphasis added).[10]

In contrast, that 1988 jurist could have and, indeed, would have most reasonably understood *Ramos*, as apparently almost every jurist in fact did, as setting forth the principle that whether to instruct juries on state *law* – like the governor's power to commute a sentence or the parole board's power to parole a prisoner – is a decision left to the "wisdom of . . . the States" by the Constitution. *Ramos*, 463 U.S. at 1014, 103 S.Ct. at 3460; *see also id.* at 1013 & n. 30, 103 S.Ct. at 3460 & n. 13. The Court itself seems to have understood *Ramos* this way when it held in 1990 in *Sawyer* that its decision in *Caldwell* was a new rule under *Teague*. As the Court said there, although the Mississippi Supreme Court's 1983 holding "without dissent . . . that *Ramos* stood for the proposition that'states may decide whether it is error to mention to jurors the matter of appellate review,' " may in retrospect have proven to be incorrect to the limited extent that it failed to recognize that a state may not provide inaccurate or misleading information even about post-sentencing procedures, it was nonetheless a reasonable conclusion at the time.

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[10] At this juncture in *Skipper*, the Court was discussing the requirements of the Eighth Amendment, not those of the Due Process Clause. However, the most natural implication would be that the rebuttal evidence that the defendant must be allowed to introduce under the Due Process Clause would be the same as that which the Court held he must be allowed to introduce under the Eighth Amendment – evidence concerning his character and offense.

497 U.S. at 237, 110 S.Ct. at 2828 (quoting *Caldwell v. State*, 443 So.2d 806 (Miss.1983)). And, of course, nothing in *Caldwell* called into question (indeed, as noted, that case only confirmed) *Ramos'* deference to the states on whether to instruct juries as to state post-sentencing laws, provided that any information the states choose affirmatively to provide is accurate. As Justice O'Connor explained:

> The Court today, relying in part on my opinion in *Caldwell v. Mississippi*, rejects petitioner's claim that the introduction of evidence of a prior death sentence impermissibly undermined the jury's sense of responsibility. I write separately to explain why in my view petitioner's *Caldwell* claim fails. The inaccuracy of the prosecutor's argument in *Caldwell* was essential to my conclusion that the argument was unconstitutional. An accurate description of the jury's role – even one that lessened the jury's sense of responsibility – would have been constitutional. [*Caldwell*, 472 U.S. at 342, 105 S.Ct. at 2646] ("a misleading picture of the jury's role is not sanctioned by [*California v. Ramos*], [b]ut neither does *Ramos* suggest that the federal Constitution prohibits the giving of accurate instructions regarding post-sentencing procedures").

Romano, 512 U.S. at ___, 114 S.Ct. at 2013 (O'Connor, J., concurring).

2.

Indeed, this very distinction between facts and legal power to subsequently modify sentences was suggested by Justice O'Connor in *Simmons* itself:

> Unlike in *Skipper*, where the defendant sought to introduce *factual evidence* tending to disprove the State's showing of future dangerousness, petitioner [here] sought to rely on the operation of *South Carolina's sentencing law* in arguing that he would not pose a threat to the community if he were sentenced to life imprisonment.

Simmons, 512 U.S. at ___, 114 S.Ct. at 2200 (O'Connor, J., concurring in the judgment) (emphasis added). Even Jonathan Dale Simmons himself drew this distinction in arguing for the rule of *Simmons*. *See* Petitioner's Br., *Simmons v. South Carolina*, No. 92-9059 (1994), at *35 ("*Skipper* concerned the exclusion of evidence, rather than the withholding of accurate legal information from the jury.").

And, at the very least, this was a reasonable distinction in 1988, considering also that relevant factual information, like secret sentencing reports or prior good behavior, cannot change with time, but a state's legal standards and post-conviction procedures, like eligibility for commutation or parole, can always change long after the sentencing jury renders its verdict. *Cf. Ramos*, 463 U.S. at 1020, 103 S.Ct. at 3463 (Marshall, J., dissenting) ("To invite the jury to indulge in such speculation is to ask it to foretell numerous imponderables: *the policies that may be adopted by unnamed future Governors and parole officials*, . . . as well as any other factors that might be deemed relevant to the commutation and *parole* decisions. Yet these are questions that 'no human mind can answer- . . . because they rest on future events which are unpredictable.' " (emphases added)). *But see Simmons*, 512 U.S. at ___, 114 S.Ct. at 2195. Moreover, this was a distinction that followed directly from the Court's holding in

Jurek, which was reaffirmed in *Ramos*, that, under the Eighth Amendment, "[w]hat is essential is that the jury have before it all possible relevant information *about the individual defendant* whose fate it must determine." *Jurek*, 428 U.S. at 276, 96 S.Ct. at 2958 (emphasis added); *see also Ramos*, 463 U.S. at 1006, 1012 n. 29, 103 S.Ct. at 3456, 3459 n. 29. And it was factual evidence about the Eighth Amendment factors relevant to the individual defendant which *Gardner* and *Skipper* had held defendants had a due process right to introduce in rebuttal of prosecution arguments concerning these factors. Not until *Simmons* itself had the Court ever held that there was a due process right to rebut prosecution arguments with evidence unrelated to the defendant's character and crime. *Cf. Sawyer*, 497 U.S. at 236, 110 S.Ct. at 2828 ("It is beyond question that no case prior to *Caldwell* invalidated a prosecutorial argument as impermissible under the Eighth Amendment.").

That the Supreme Court in *Simmons* ultimately resolved any tension between the *Gardner/Skipper* right to rebut state arguments with factual evidence, and *Ramos'* pronouncement that the states are owed deference as to whether to instruct their juries on the implications of state laws governing the powers of commutation and parole, and that it resolved that tension by permitting argument based upon state law in the narrow circumstance of capital cases where future dangerousness is argued and the defendant is parole ineligible, is, of course, not determinative of the new rule inquiry. The question is not whether the distinction between arguments from factual evidence concerning the defendant's character and offense and arguments from state law itself

was necessarily correct, or whether it was ultimately accepted by the Court as dispositive; rather, the only question is whether it would have been objectively unreasonable for a jurist in 1988 – forced to grapple with and reconcile *Gardner, Skipper, Ramos*, and *Caldwell* – to have drawn this distinction, and therefore to have concluded that the rule in *Simmons* was not compelled. *See Wright*, 505 U.S. at 304, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment) ("To determine what counts as a new rule, *Teague* requires courts to ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by binding precedent at the time his state court conviction became final."). The answer to this latter question is most assuredly "no." In no sense would this have been an "illogical or even a grudging application," *Butler*, 494 U.S. at 415, 110 S.Ct. at 1217, of these cases, as evidenced by the fact that Justice O'Connor recognized the very same distinction in her opinion in *Simmons*.

Even the *Simmons* plurality seems to have acknowledged as much. After noting that "[t]he few states that do not provide capital-sentencing juries with any information regarding parole ineligibility seem to rely . . . on the proposition that *California v. Ramos* held that such determinations are purely matters of state law," *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2195-96, the plurality implicitly validated the reasonableness of this reliance, conceding that "[i]t is true that *Ramos* stands for the broad proposition that [the Court] generally will defer to a State's determination as to what a jury should and should not be told about sentencing," a proposition with which the full Court agreed, *id.*; *see also id.* at ___, 114 S.Ct. at 2200

(O'Connor, J., concurring in the judgment) ("The decision whether or not to inform the jury of the possibility of early release is generally left to the States."). In other words, the Court itself seemed to understand that it had chosen to recognize in *Simmons* yet another exception to what was (and is still today) indisputably its general rule of deference to the states on whether to inform their juries of state law governing such matters as commutation and parole. *See, e.g., Simmons,* 512 U.S. at ___, 114 S.Ct. at 2201 (O'Connor, J., concurring in the judgment) ("[D]espite our general deference to state decisions regarding what the jury should be told about sentencing, I agree that due process requires . . . . "); *see also Johnson v. Scott,* 68 F.3d 106, 111 n. 11 (5th Cir.1995), *cert. denied,* ___ U.S. ___, 116 S.Ct. 1358, 134 L.Ed.2d 525 (1996).[11]

In holding that *Simmons* announced a new rule, we recognize that Justice Blackmun stated in his opinion in *Simmons* that "[t]he trial court's refusal to apprise the jury of information crucial to its sentencing determination . . . cannot be reconciled with our well-established precedents interpreting the Due Process Clause," and that "[t]he principle announced in *Gardner* [and] reaffirmed in

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[11] As the Fifth Circuit explained in *Johnson,*

> *Simmons* . . . announce[d] a new rule because it held that *in some situations the states are no longer free to decide* whether an instruction on parole should be given. This is inconsistent with the Court's earlier ruling in *California v. Ramos.* In *Ramos,* the Court held, *inter alia,* that whether or not an instruction on post-sentencing contingencies was appropriate remained properly in the hands of the states.

68 F.3d at 111 n.11 (emphasis added).

Skipper . . . compels" this conclusion. *Simmons,* 512 U.S. at ___, 114 S.Ct. at 2194 (Blackmun, J.) (emphasis added). However, not only is this *dicta,* it is merely that of a plurality of the Court. Notably, Justice O'Connor's concurrence in the judgment, joined by the Chief Justice and Justice Kennedy, and necessary for the *Simmons* majority, avoids any suggestion that the Court's decision was "compelled" by prior caselaw. In any event, the Court itself has admonished that categorical language about the degree to which a decision on the merits is controlled by prior decisions does not determine whether that decision was compelled for new rule purposes. *See, e.g., Butler,* 494 U.S. at 415, 110 S.Ct. at 1217. As the Court stated in *Butler:*

> [T]he fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under *Teague.* Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts.

Id. We do not ascribe any particular significance to the fact that Justice Blackmun used the word "compels" in *Simmons,* instead of "controlled" or "within the logical compass of," as used by the Court in *Butler.* The point of the *Butler* passage, as we understand it, is that the hortatory *dicta* used in opinions to underscore their faithfulness to precedent should not be considered binding upon the separate question of whether they announced a new rule under *Teague. Cf. Penry,* 492 U.S. at 353, 109 S.Ct. at

2965 (Scalia, J., dissenting) ("In a system based on precedent and stare decisis, it is the tradition to find each decision 'inherent' in earlier cases. . . . ").

D.

Our conclusion that the determination in 1988 that the Constitution did not require O'Dell be allowed to argue parole ineligibility was a "reasonable, good-faith interpretation[ ] of existing precedents," *Butler*, 494 U.S. at 414, 110 S.Ct. at 1217, is "confirmed by the experience of the lower courts." *Caspari*, 510 U.S. at 393, 114 S.Ct. at 955.

As Justice Kennedy noted for the Court in *Sawyer*, "[s]tate courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." 497 U.S. at 241, 110 S.Ct. at 2831. Because "[c]onstitutional error is not the exclusive province of the federal courts, . . . in the *Teague* analysis the reasonable views of state courts are entitled to consideration along with those of federal courts." *Caspari*, 510 U.S. at 395, 114 S.Ct. at 956. In 1988, the Virginia Supreme Court, which, "as a state court, is the primary beneficiary of the *Teague* doctrine," *Stringer*, 503 U.S. at 237, 112 S.Ct. at 1140, had repeatedly held that "it [is] the jury's duty to assess the penalty, irrespective of considerations of parole." *Poyner*, 329 S.E.2d at 828; *see also Stamper*, 257 S.E.2d at 821 (expressly relied upon by the trial court in denying O'Dell's request, J.A. at 2378-79); *Williams v. Commonwealth*, 234 Va. 168, 360 S.E.2d 361, 368 (1987) ("A reduced sentence is not the

responsibility of the judiciary but of the executive department, and argument as to what that department might do encroaches upon the separation of their functions."), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988); *Turner v. Commonwealth*, 234 Va. 543, 364 S.E.2d 483, 487-88, *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988) (rejecting petitioner's argument that, under *Skipper* and *Ramos*, he should be entitled to present evidence on parole eligibility). Of course, the Virginia Supreme Court's decision on direct appeal in this case – an "especially valuable" opinion because it "concern[s] the legal implications of precisely the same set of facts [and so] is the closest one can get to a 'case on point,' " *Wright*, 505 U.S. at 305, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment) – concluded as well, relying on the long line of Virginia precedent, that the defendant should not be able to argue parole eligibility. *O'Dell*, 364 S.E.2d at 507. And, from 1988 until *Simmons*, the Virginia Supreme Court continued to rely on *Ramos* in denying parole-ineligible defendants the right to argue their parole ineligibility to capital sentencing juries. As the Court elaborated in *Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380, 394 (1992) (emphasis added), *cert. denied*, 507 U.S. 1043, 113 S.Ct. 1880, 123 L.Ed.2d 498 (1993),

> Mueller argues that the trial court violated his due process rights by refusing to instruct the jury that, pursuant to Code § 53.1-151(B1), he would not be eligible for parole. . . . We hold that the trial court did not err in its rulings here. This Court has held uniformly and repeatedly that information regarding parole eligibility is not relevant for the jury's consideration. Further, *the United States Supreme Court has expressly*

left the determination of this question to the individual states as a matter of state law. California v. Ramos. 463 U.S. 992, 1013-14, 103 S.Ct. 3446, 3460, 77 L.Ed.2d 1171 (1983).

Although likewise not necessarily dispositive, the federal appellate courts' views in 1988 are also "relevant," *Stringer,* 503 U.S. at 237, 112 S.Ct. at 1140, to determining whether *Gardner* and *Skipper* compelled the result in *Simmons.* The federal circuits were uniform in concluding not only that *Gardner* and *Skipper* did not compel that result, but that *Ramos* compelled precisely the opposite – deference to the States' choices about whether to inform juries about parole. In *Turner v. Bass,* 753 F.2d 342, 354 (4th Cir.1985) (Widener, Hall, Phillips, JJ.) (emphasis added), *rev'd on other grounds sub nom. Turner v. Murray,* 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), our circuit, for example, considered this issue and agreed with the Supreme Court of Virginia:

> In arriving at its decision [in *Ramos*], the Court noted: "[o]ur conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their state should not be permitted to consider the governor's power to commute a sentence.[30]" In footnote 30 the Court stated that "[m]any state courts have held it improper for the jury to consider or to be informed – through argument or instruction – of the possibility of commutation, pardon, or parole." [*Ramos,* 463 U.S. at 1013 & n. 30, 103 S.Ct. at 3460 & n. 30.] While not exactly on point, *we think Ramos indicates that the Court would decide that while it is constitutionally permissible to instruct the jury on the subject of parole, such an instruction is not constitutionally required. We so hold.*

In doing so, our circuit relied upon a decision of the Fifth Circuit, *O'Bryan v. Estelle,* 714 F.2d 365, 389 (5th Cir.1983), *cert. denied,* 465 U.S. 1013, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984), which had understood *Ramos* as we had:

> [W]e cannot say that an instruction on parole is constitutionally mandated in a capital case. *See California v. Ramos,* [463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171] (1983) (instruction informing jurors in capital case that governor has power to commute "life sentence without possibility of parole" but not informing them of equivalent power to commute death sentence not unconstitutional).

We do not find persuasive O'Dell's argument that *Turner v. Bass* and *O'Bryan* should be disregarded because they were decided before *Skipper.* The *Skipper* footnote addressing due process was merely a reaffirmation of the *Gardner* plurality, and it did not in any way draw into question *Ramos.* The reasonableness of the *Bass* and *O'Bryan* conclusion (now, under *Simmons,* held to be wrong) is confirmed by the fact that both circuits, like Virginia's Supreme Court, continued with their holdings regarding instructions on parole long after *Skipper. See Peterson v. Murray,* 904 F.2d 882, 886-87 (4th Cir.) (Hall, Sprouse, Wilkinson, JJ.) ("[W]e believe that *Ramos* left to the states the decision concerning what, if anything, a jury should be told about commutation, pardon, and parole." (citing *Turner v. Bass*)), *cert. denied,* 498 U.S. 992, 111 S.Ct. 537, 112 L.Ed.2d 547 (1990); *Knox v. Collins,* 928 F.2d 657, 660 (5th Cir.1991) (rejecting petitioner's claim "that the Constitution mandates instruction on parole in capital cases" and holding that "[t]he decision whether to require such an instruction rests entirely with the state

legislature"); *cf. United States v. Chandler*, 996 F.2d 1073, 1086 (11th Cir.1993) (holding that "[t]he range of possible sentences [including "the possibility of life without parole"] that [petitioner] might receive in the event the jury did not recommend death does not fall within th[e] definition [of "mitigating factors as 'any aspect of a defendant's character or record and any of the circumstances of the offense.' *Lockett v. Ohio* . . . ; *Skipper v. South Carolina*," and so] "the district court was not required to inform the jury of the possible sentences [petitioner] might face"), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2724, 129 L.Ed.2d 848 (1994).

Nor do we believe it could even be contended that the decisions of the Fourth Circuit, the Fifth Circuit, and of the Virginia Supreme Court, that *Ramos* left the desirability of instructions on parole eligibility or ineligibility to the authority of the states, were in any way "objectively unreasonable."*See Stringer*, 503 U.S. at 237, 112 S.Ct. at 1140.

As *Butler* recognized in holding that *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), announced a new rule, "[t]hat the outcome in *Roberson* was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits." 494 U.S. at 415, 110 S.Ct. at 1217.[12] Even

[12] *See also Caspari*, 510 U.S. at 395, 114 S.Ct. at 956 ("Two Federal Courts of Appeals and several state courts had reached conflicting holdings on the issue. Because that conflict concerned a 'developmen[t] in the law over which reasonable jurists [could] disagree,' *Sawyer v. Smith*, 497 U.S. 227, 234, 110 S.Ct. 2822, 2827, 111 L.Ed.2d 193 (1990), [ruling in petitioner's favor on *habeas* would announce a new rule].").

more so was "the outcome in [*Simmons*] . . . susceptible to debate among reasonable minds," as "evidenced" by the *unanimous* disagreement with that outcome by the Fourth and Fifth Circuits, and by the Virginia Supreme Court.

E.

We therefore conclude that the rule in *Simmons* – that due process requires that a capital defendant be allowed to rebut prosecution arguments of future dangerousness with his ineligibility for parole – was not compelled by existing precedent, and that the state and federal judges who held otherwise in 1988 were not objectively unreasonable in so holding.[13] If, as the Court held in *Sawyer, Caldwell*'s limited exception that states cannot affirmatively provide inaccurate information to juries concerning their role is the sentencing process was not, because of *Ramos*' seemingly categorical deference to the states on such matters, compelled, then *a fortiori Simmons*' more

[13] The district court's conclusion in footnote that the precedent in 1988 also dictated the result that the Eighth Amendment required that the jury be informed of future dangerousness, J.A. at 335, is inexplicable, considering that such a rule would be new even today. *See Simmons*, 512 U.S. at ___ n. 4, 114 S.Ct. at 2193 n. 4 (plurality); *id.* at ___, 114 S.Ct. at 2199 (Ginsburg, J., concurring); *id.* at ___, 114 S.Ct. at 2200 (O'Connor, J., concurring); *cf. id.* at ___-___, 114 S.Ct. at 2198-99 (Souter, J., concurring). For the same reasons that we hold that the precedent in 1988 did not compel the conclusion that due process required *Simmons*, we hold that the same precedent did not compel a conclusion that the Eighth Amendment required *Simmons*.

sweeping exception that states must affirmatively correct, or at least allow the correction of, pre-existing juror misconceptions concerning state post-sentencing laws and procedures, was, for the same reason, not compelled either.

It was, at the very least, not unreasonable for jurists to have concluded that the broad deference afforded the states with respect to informing juries of state law regarding commutation and parole had not been withdrawn from them by a mere plurality and a single majority footnote, the latter of which treated the due process holding so dismissively that three Justices criticized the Court as having "unnecessarily abandon[ed]" this grounds for decision, *Skipper*, 476 U.S. at 11, 106 S.Ct. at 1674 (Powell, J., concurring in the judgment, joined by Burger, C.J., and Rehnquist, J.). Tellingly, this footnote, which O'Dell now maintains *compelled* the result in *Simmons*, was not even mentioned in O'Dell's own 151-page federal *habeas* petition filed in 1992 on his behalf by two major, nationally-recognized law firms, Hunton & Williams, and Paul, Weiss, Rifkind, Wharton & Garrison.

As Justice O'Connor reminded in *Johnson v. Texas* [509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290]:

> When determining whether a rule is new, we do not ask whether it fairly can be discerned from our precedents; we do not even ask if most reasonable jurists would have discerned it from our precedents. We ask only whether the result was *dictated* by past cases, or whether it is "susceptible to debate among reasonable minds."

509 U.S. at 378, 113 S.Ct. at 2675 (O'Connor, J., dissenting, joined by Blackmun, Stevens, and Souter, JJ.). Considering that every Member of the Supreme Court of the United States – the five Members of the *Ramos* majority and the four dissenters – had seemed to expressly approve, as constitutionally permissible, the practice of the several states of forbidding any argument or instruction to the jury concerning commutation, pardon, or parole, and considering that that same Court rejected a claim virtually identical to that which prevailed in *Simmons*, if *Simmons* did not announce a new rule, then we are at a loss to understand how *Teague* has any real meaning at all.

Accordingly, we hold that *Simmons* announced a new rule under *Teague*, and, therefore, that O'Dell cannot avail himself of the rule of *Simmons*, unless it falls within "one of the two narrow exceptions to the nonretroactivity principle." *Caspari*, 510 U.S. at 390, 114 S.Ct. at 953.

F.

The first exception applies to those rules that place " 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,' " *Teague*, 489 U.S. at 307, 109 S.Ct. at 1073 (quoting *Mackey v. United States*, 401 U.S. 667, 692, 91 S.Ct. 1171, 1180, 28 L.Ed.2d 388 (1971) (opinion of Harlan, J.)), or "address[ ] a 'substantive categorical guarante[e] accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.' " *Saffle*, 494 U.S. at 494, 110 S.Ct. at 1263 (quoting *Penry*, 492 U.S. at 329, 330, 109

S.Ct. at 2952, 2952). This exception "is clearly inapplicable here," *Gilmore*, 508 U.S. at 345, 113 S.Ct. at 2119, because the rule announced in *Simmons* "neither decriminalize[s] a class of conduct nor prohibit[s] the imposition of capital punishment on a particular class of persons [because of their status or offense]." *Saffle*, 494 U.S. at 495, 110 S.Ct. at 1263-64.

The second exception applies to " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal procedure." *Id.* (quoting *Teague*, 489 U.S. at 311, 109 S.Ct. at 1075). This exception "is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." *Graham*, 506 U.S. at 478, 113 S.Ct. at 903 (internal quotations omitted). "A rule that qualifies under this exception must not only improve accuracy, but also ' "alter our understanding of the *bedrock procedural elements*" ' essential to the fairness of a proceeding." *Sawyer*, 497 U.S. at 242, 110 S.Ct. at 2831 (quoting *Teague*, 489 U.S. at 311, 109 S.Ct. at 1075 (quoting *Mackey*, 401 U.S. at 693, 91 S.Ct. at 1180)). And, "[b]ecause we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, . . . it is unlikely that many such components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313, 109 S.Ct. at 1077. We do not believe that the rule announced in *Simmons* is on par with the rule announced in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), a rule the Court has "usually cited . . . to illustrate the type of rule coming within the exception," *Saffle*, 494 U.S. at 495, 110 S.Ct. at 1264; *see also Gray*, ___ U.S. ___, ___, 116 S.Ct. 2074, 2084, 135

L.Ed.2d 457, and we conclude that it does not come within the second exception to *Teague*.

We therefore hold that *Simmons* announced a new rule of which O'Dell cannot avail himself.[14]

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[14] Because we hold that *Simmons* announced a new rule, we do not address whether the failure to give the *Simmons* instruction in this case was harmless error under *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993) ("[H]abeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice,' " *i.e.*, whether "the error 'had substantial and injurious effect or influence in determining the jury's verdict.' " (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946))).

Nevertheless, there are strong indications that even if it had been error, it would have been harmless under *Brecht* given the heinousness of the crime, O'Dell's lengthy and frightening criminal record, and O'Dell's own testimony from the stand that he would spend the rest of his life behind bars, J.A. at 2433. Moreover, the court's failure to inform the jury of parole ineligibility calls into question only the jury's finding of future dangerousness, leaving the vileness finding untouched, which may be sufficient to sustain the death penalty under *Zant v. Stephens*, 462 U.S. 862, 884, 103 S.Ct. 2733, 2746, 77 L.Ed.2d 235 (1983) ("[A] death penalty supported by at least one valid aggravating circumstance need not be set aside . . . simply because another aggravating circumstance is 'invalid' in the sense that it is insufficient by itself to support the death penalty."). Although the Virginia Supreme Court did state that "the jury did not base its verdict on the vileness predicate," *O'Dell*, 364 S.E.2d at 507, it appears to have clearly erred in saying this, as O'Dell himself appears to recognize. *See* Petitioner's Br. at 42-43. The jury verdict expressly stated that, in addition to finding that O'Dell posed a future danger,

> having unanimously found that [O'Dell's] conduct in committing the offense was outrageously wanton,

III.

Before the federal district court on *habeas*, O'Dell raised innumerable constitutional claims. J.A. at 281-84. Nine of those claims were raised for the first time at the state *habeas* proceeding,[15] although, as the state *habeas* court expressly found, *see* J.A. at 285, these claims had been ripe for presentation on direct appeal. Virginia law bars the consideration on *habeas* of trial errors that could be, but were not, raised on direct appeal. *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108, 95 S.Ct. 780, 42 L.Ed.2d 804 (1975). Therefore, the federal district court properly held that these claims were procedurally barred from review on federal *habeas* under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), absent cause and prejudice.

A.

The Commonwealth also argues that ten additional claims of O'Dell's before the federal *habeas* court are procedurally barred because the Virginia Supreme Court dismissed as untimely their appeal from the state *habeas*

> vile or inhuman and it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

J.A. at 2506.

[15] These claims were denominated Id, IIh, IV, V, VI, X, XI, XVIII, and XXII in the federal district court. J.A. at 286.

proceeding.[16] After the state *habeas* court dismissed O'Dell's petition, he filed an "Assignments of Error" with the Virginia Supreme Court. Virginia law, however, requires that a "Petition for Appeal" be filed instead, in order to appeal from a denial of the writ of *habeas corpus*. By the time O'Dell attempted to correct his error, the three months to file such a petition had passed, and so the Virginia Supreme Court dismissed his Petition for Appeal as untimely under Va. S.Ct. Rule 5:17(a)(1).[17] J.A. at 216. That dismissal is sufficient to bar federal *habeas* review of those claims,[18] so long as the dismissal rested

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[16] These claims were denominated Ia, Ibi, Ibii, Ibiv, Ic, Ie, Ig, XVII, XX, and XXIII in the federal district court. J.A. at 285. Additionally, claims Id, V, VI, X, XI, XVIII, and XXII were also dismissed by the Virginia Supreme Court as untimely on appeal from the state *habeas* proceeding, but, because they were procedurally barred in any event under *Slayton*, *see supra*, we do not consider them further.

[17] On March 6, 1991, the deputy chief clerk of the Virginia Supreme Court and an assistant state attorney general informed O'Dell that he should have filed a petition for appeal rather than assignments of error. J.A. at 287 n.3. O'Dell claims that the state assistant attorney general then told him over the telephone that he had "no objection" to O'Dell trying to "supplement" his filing, and that the Commonwealth would not oppose that supplementation. *Id.* Regardless of whether such a phone conversation actually took place, the Commonwealth did in fact oppose the motion to amend when it was filed on March 8, and the Virginia Supreme Court denied that motion, as was its prerogative.

[18] That the full text of the Virginia Supreme Court opinion was but one sentence – "Finding that the appeal was not perfected in the manner provided by law, the Court rejects the petition for appeal in the above-styled case. Rule 5:17(a)(1)," J.A. at 216 – is of course of no moment. "[A] state court that

upon "adequate and independent state grounds." *Wainwright*, 433 U.S. at 81, 97 S.Ct. at 2503; *see also Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 636, 22 L.Ed. 429 (1874).

1.

The federal *habeas* court, relying on *James v. Kentucky*, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984), and *Ford v. Georgia*, 498 U.S. 411, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991), held that, because the distinction between assignments of error and petitions for appeal was not "firmly established and regularly followed" in capital cases, the Virginia Supreme Court's determination that these claims were procedurally barred as untimely was not a state ground "adequate" to bar federal *habeas* review. J.A. at 292 (quoting *James*, 466 U.S. at 348-49, 104 S.Ct. at 1835-36). In so holding, the district court did not conclude, and O'Dell has never maintained, that this distinction has not been "regularly followed";[19] rather,

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wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.' " *Harris v. Reed*, 489 U.S. 255, 265 n. 12, 109 S.Ct. 1038, 1045 n. 12, 103 L.Ed.2d 308 (1989).

[19] The Commonwealth argues, and O'Dell presents no evidence to the contrary, that "Virginia clearly and consistently requires the filing of a petition for appeal on any appeal from a judgment of the habeas corpus proceeding, regardless of whether the habeas case involves the death penalty." Respondent's Reply Br. at 32. *See, e.g., Yeatts v. Murray*, 249 Va. 285, 455 S.E.2d 18, 20 (1995) ("award[ing] Yeatts an appeal limited to [certain issues]" following circuit court's denial of petitioner's writ of *habeas corpus*); *id.* 455 S.E.2d at 21-22 (refusing to consider a claim raised in appellant's brief because it failed to comply with Rule 5:17(c) governing petitions for

the district court determined that the distinction failed the first requirement of *James*, that it be "firmly established." As a general matter, whenever a procedural rule is derived from state statutes and supreme court rules, as this one is, the rule is necessarily "firmly established."[20] The district court in this case, however, concluded that the many Virginia "rules are ambiguous on the procedure for appeals from the denial of state habeas decisions," J.A. at 291, and therefore that the distinction between petitions for appeal and assignments of error was not "firmly established."

On the face of those rules, however, we can discern no ambiguity whatsoever. Va. S.Ct. Rule 5:17(a)(1) (emphasis added) requires that a "petition for appeal" be filed with the clerk "[i]n *every* case in which the appellate

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appeal); *Epperly v. Booker*, 235 Va. 35, 366 S.E.2d 62, 63 (1988) ("[T]he defendant filed a petition for a writ of habeas corpus in the court below, the court denied the petition, and *we granted the petitioner an appeal.*" (emphasis added)); *Peterson v. Bass*, 2 Va.App. 314, 343 S.E.2d 475, 480 (1986) (Barrow, J., dissenting) ("Peterson has taken all steps necessary to entitle him to have his petition for appeal considered on its merits by the Supreme Court. He filed a timely notice of appeal to the Supreme Court and subsequently filed a timely petition for appeal [from his *habeas* petition attacking his capital conviction]."); *compare Rogers v. Commonwealth*, 242 Va. 307, 410 S.E.2d 621, 622-23 (1991) (considering, on direct capital appeal, defendant's assignments of error).

[20] Although unambiguous statutes or court rules are always "firmly established," new procedural rules created after the time they had to be obeyed, *see Ford*, 498 U.S. at 424-25, 111 S.Ct. at 857-58, and procedural distinctions regularly ignored by state courts, *see James*, 466 U.S. at 346-47, 104 S.Ct. at 1834-35, are by definition not.

jurisdiction of [the Virginia Supreme Court] is invoked. . . . " Here, the Virginia Supreme Court's appellate jurisdiction was invoked, and O'Dell did not file a petition for appeal.

The Virginia Supreme Court had appellate jurisdiction over this appeal under Va.Code § 17-116.05:1(B) (emphasis added), which provides that,

> [i]n accordance with other applicable provisions of law, *appeals lie directly to the Supreme Court* from a *conviction in which a sentence of death is imposed,* from a final decision, judgment or order of a circuit court *involving a petition for a writ of habeas corpus,* . . . and from [other proceedings not relevant here].

Contrary to the district court's conclusion, J.A. at 290, this provision does not at all "indicate[ ] that the same procedural rules that apply to appeals of convictions in death penalty cases also apply to appeals from decisions of circuit courts involving habeas corpus petitions." Rather, the section is a jurisdictional provision; the title of the section even reads, as it pertains to the above-quoted subsection, "[C]ases over which Court of Appeals does not have jurisdiction."[21] The provision does not in any

[21] Prior to 1985, when this statute was amended to provide that appeals "involving" *habeas corpus* "lie directly" to the Supreme Court, such appeals were in the exclusive jurisdiction of the Court of Appeals. *Titcomb v. Wyant,* 323 S.E.2d 800 (Va.1984). Even after *Titcomb,* however, the Supreme Court retained jurisdiction for *habeas* appeals in capital cases, because "it would be inconsistent with the legislative design . . . to conclude that [the Court of Appeals] lack[ed] jurisdiction to hear direct appeals [in capital cases], but that[it] possess[ed] . . . jurisdiction [over *habeas* challenges to capital convictions]." *Peterson,* 343 S.E.2d at 478.

That the 1985 amendment was simply an alteration in jurisdiction over all *habeas* appeals has been recognized by the Virginia Courts:

> It is clear from the 1985 amendment to Code § 17-116.05:1(B) that effective July 1, 1985, the General Assembly terminated the jurisdiction of [Virginia's intermediate appellate courts] to hear and determine appeals from a final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus. . . . [T]he clear legislative intent expressed in the 1985 amendment [was] that habeas corpus cases on appeal from the circuit court go directly to the Supreme Court.

White v. Garraghty, 2 Va.App. 117, 341 S.E.2d 402, 405-06 (1986); *see also Peterson,* 343 S.E.2d at 477 n. 4.

way purport to control the *form* of the appeal for the several categories of cases that are to be appealed directly to the Virginia Supreme Court rather than to the intermediate Court of Appeals. In fact, it expressly provides that those appeals lie "in accordance with other applicable provisions of law." It would be odd, then, to read this section as altering the general rule that "[i]n *every* case in which the appellate jurisdiction of [the Supreme] Court is invoked, a petition for appeal *must* be filed." Va. S.Ct. Rule 5:17(a) (emphasis added).

Virginia does require the filing of assignments of error rather than a petition for appeal in its "Special Rule Applicable to Cases in Which Sentence of Death Has Been Imposed":

> (a) Upon receipt of a record pursuant to § 17-110.1 B, the clerk of this Court shall notify

> in writing counsel. . . . The case shall thereupon stand matured as if an appeal had been awarded to review the conviction and the sentence of death. . . .
>
> (b) Within 10 days after the Filing Date, counsel for the appellant shall file with the clerk . . . *assignments of error* upon which he intends to rely for reversal of the conviction or review of the sentence of death.

Va. S.Ct. Rule 5:22 (emphasis added). It is plain, however, that this provision relates only to the *direct* review of death penalty sentences. That Rule 5:22 is confined to capital cases on direct review is confirmed on a number of grounds. First, the very title of the rule is "Special Rule Applicable to Cases in Which Sentence of Death Has Been Imposed." A *sentence* of death is *imposed* at the end of the sentencing phase of the trial; in no manner is the sentence *imposed* by a subsequent denial of the writ of *habeas corpus*. This distinction is unmistakable in light of section 17-116.05:1, *supra*, which provides for direct review by the Supreme Court of *both* "conviction[s] in which a *sentence* of death is *imposed*" *and* "final decision[s], judgment[s] or order[s] of a circuit court involving a petition for a writ of habeas corpus." If the two were identical, the provision of direct Supreme Court jurisdiction for each would be redundant. Additionally, the assignments of error referenced in Rule 5:22 are those "upon which [counsel] intends to rely *for reversal of the conviction* or *review of the sentence of death*." Neither remedy is available upon appeal from a denial of a writ of *habeas corpus;* the denial of the writ can be either affirmed or reversed, but the underlying conviction and sentence are not being reviewed (they are only reviewable on *direct* appeal). *Cf. Coleman v. Thompson*, 501 U.S. 722, 730, 111 S.Ct. 2546, 2554, 115 L.Ed.2d 640 (1991) ("When a federal district court reviews a state prisoner's habeas corpus petition pursuant to 28 U.S.C. § 2254, it must decide whether the petitioner is 'in custody in violation of the Constitution or laws or treaties of the United States.' *The court does not review a judgment, but the lawfulness of the petitioner's custody simpliciter.*" (emphasis added)).

Moreover, Rule 5:22 on its own terms is triggered by receipt of a record pursuant to Va.Code § 17-110.1(B), a section unquestionably addressing direct review of death sentences:

> § 17-110.1. Review of death sentence. –
>
> A. A *sentence* of death, *upon the judgment thereon becoming final in the circuit court*, shall be reviewed on the record by the Supreme Court.
>
> B. The proceeding in the circuit court shall be transcribed as expeditiously as possible, and the transcript filed forthwith . . . and transmit[ted] . . . to the Supreme Court.
>
> C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:
>
> 1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
>
> 2. Whether the sentence of death is excessive or *disproportionate* to the penalty imposed in similar cases, considering both the crime and the defendant.

D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:

1. *Affirm the sentence of death;*

2. *Commute the sentence of death* to imprisonment for life; or

3. *Remand* to the *trial court* for a new sentencing proceeding.

. . .

F. *Sentence review* shall be *in addition to appeals, if taken,* and *review and appeal may be consolidated.*

That this section addresses only direct review is self-evident. *See Payne v. Commonwealth,* 233 Va. 460, 357 S.E.2d 500, 508 ("In death penalty cases, . . . a defendant is afforded a *direct,* full review as a matter of right. Code § 17-110.1." (emphasis added)), *cert. denied,* 484 U.S. 933, 108 S.Ct. 308, 98 L.Ed.2d 267 (1987). As part A provides, the section is operative only "upon the judgment [of a sentence of death] becoming final in the circuit court." A sentence of death does not become final when a subsequent court denies a writ of *habeas corpus;* it becomes final upon the entry of the judgment by the trial court. Likewise, the proportionality review and independent examination of the sentence for arbitrariness provided for in part C occur on direct review, not *habeas.* And the remedies provided in part D – "affirm[ing] the sentence of death," "commut[ing] the sentence of death," and "remand[ing] to the *trial court*" – are not available at all to a court reviewing a denial of *habeas;* they are possible only on direct review.

Finally, part F makes absolutely clear that the entire section is addressed only to direct review of the death *sentence* itself (as even the title of the section sets forth), not even to the underlying conviction for capital murder. That underlying conviction may be, but, under this section need not necessarily be ("if taken"), consolidated with the direct review of the death sentence. Indeed, under Rule 5:22, that consolidation is automatic: "The case shall thereupon stand matured as if an appeal had been awarded to review the conviction and the sentence of death. . . . "

Thus, the Virginia statutory scheme is not at all ambiguous. As a general rule, a petition for appeal *must* be filed in every case for which review is sought by the Virginia Supreme Court. For direct review of death sentences and their accompanying capital convictions, Rule 5:22 (itself, denominated a "special rule") creates an exception, providing that assignments of error should instead be filed. But nowhere in that exception, or in section 17-110.1(B) to which it refers, is there any possible reference to appeals from a denial of a writ of *habeas corpus.* The only relevant reference to denials of writs of *habeas corpus* is in section 17-116.05:1, which provides merely that jurisdiction shall lie in the Supreme Court. And that section makes no reference to the form those appeals should take; so the general rule requiring a petition of appeal necessarily obtains.

We recognize that Justice Blackmun, joined by Justices Stevens and O'Connor, questioned whether the Virginia Supreme Court's dismissal of these claims as untimely constituted a state ground "adequate" to bar federal *habeas* review. *See O'Dell,* 502 U.S. at 997-98, 112

S.Ct. at 619-20 (Blackmun, J.). Justice Blackmun commented that the ground "may" not be "adequate" under *James* and *Ford* because of the "ambiguity of the Virginia statute." We believe, however, that upon closer inspection, there is no ambiguity at all.[22] Therefore, we hold that the Virginia Supreme Court's dismissal of O'Dell's appeal from the denial of the writ of *habeas corpus* as untimely was a state ground "adequate" to bar federal *habeas* review.

2.

Although the district court did not agree, J.A. at 288, Justice Blackmun also commented that the Virginia Supreme Court's rejection "may" not have been "independent," in that it "fairly appears to rest primarily on federal law, or to be interwoven with the federal law,"

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[22] Because these procedural rules are expressly set out in unambiguous state statutes and supreme court rules, and because in Virginia they have been regularly followed, *see supra* note 19, they are qualitatively different from the rule at issue in *James*. In *James*, the distinction between jury "instructions" and "admonitions" was "not always clear or closely hewn to," as evidenced by the fact that the Kentucky Supreme Court had "recognized that the content of admonitions and instructions can overlap," had "acknowledged that 'sometimes matters more appropriately the subject of admonition are included with or as a part of the instructions,' " and had used the terms interchangeably for a number of years (as had the trial courts). 466 U.S. at 346-47, 104 S.Ct. at 1834-35. Likewise, because Virginia's rules existed long before the commencement of O'Dell's state *habeas* proceeding, they are nothing like the procedural rule that Georgia had applied retroactively in *Ford* to a proceeding that had been completed long before the creation of the rule.

Michigan v. Long, 463 U.S. 1032, 1040, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983), because, as in *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53 (1985), "the State has made application of the procedural bar depend on an antecedent ruling on federal law." Justice Blackmun observed,

> the Virginia Supreme Court's rejection may not be based on an independent state ground because *Tharp v. Commonwealth*, 211 Va. 1, 175 S.E.2d 277 (1970), requires the Virginia Supreme Court to consider whether a constitutional right was abridged before denying an extension of time for filing a petition for appeal.

O'Dell, 502 U.S. at 998, 112 S.Ct. at 619-20.

Justice Blackmun then noted that this case "may be distinguishable," *id.* at 998 n. 5, 112 S.Ct. at 620 n. 5, from *Coleman*, which rejected a nearly identical claim, because here the Virginia Supreme Court was considering an untimely *petition* for appeal rather than the untimely *notice* of appeal at issue in *Coleman*. *See also* J.A. at 292 n.7 (federal district court distinguishing *Coleman* on same ground). But this possible distinction is refuted by the express language of *Coleman*. As Justice O'Connor wrote for the Court,

> *Ake* was a direct review case. *We have never applied its rule regarding independent state grounds in federal habeas.* But even if *Ake* applies here, it does Coleman no good because the Virginia Supreme Court relied on an independent state procedural rule.
>
> . . .

> We are not convinced that *Tharp* stands for the rule that Coleman believes it does. Coleman reads that case as establishing a practice in the Virginia Supreme Court of examining the merits of all underlying constitutional claims *before denying a petition for appeal or writ of error as time barred*. A more natural reading is that the Virginia Supreme Court will only grant an extension of time if *the denial itself* would abridge a constitutional right. That is, the Virginia Supreme Court will extend its time requirement only in those cases in which the petitioner has a constitutional right to have the appeal heard.

Coleman, 501 U.S. at 741-42, 111 S.Ct. at 2560 (first and second emphases added).[23]

We agree that the rule of *Ake* concerning the state procedural rules and underlying federal claims does not apply in the *habeas* context, and, regardless, because we read *Tharp* the same way that the Court in *Coleman* did, we hold that the Virginia Supreme Court's application of Va. S.Ct. Rule 5:17(a)(1) was also an independent state ground sufficient to bar federal *habeas* review.

3.

Because the Virginia Supreme Court's application of Rule 5:17(a)(1) was an "adequate and independent state

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[23] The Court in *Coleman* did comment that the Virginia Supreme Court had there not applied *Tharp* because that case concerns only petitions for appeal, as contrasted to the "purely ministerial" notice of appeal at issue in *Coleman* – but it did so only as an alternative holding, following the aforementioned analysis of *Tharp* and the qualifying phrase, "[e]ven if we accept Coleman's reading of *Tharp*." *Id.*

ground," federal *habeas* review of O'Dell's defaulted claims, *which are meritless in any event*,[24] is barred absent

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[24] The district court, because it found that Rule 5:17(a)(1) was not an adequate and independent state ground under *James*, proceeded to rule against O'Dell on the merits of these claims. Principally, the claims were that O'Dell was not competent to waive his right to counsel, that, at a minimum, his competency was never appropriately determined, and that even if he was competent, his waiver of the right to counsel was not voluntary, knowing, and intelligent. Although it should not have reached the claims, on the merits, the district court correctly rejected them.

First, the standard for competency to waive the right to counsel is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Godinez v. Moran*, 509 U.S. 389, 396, 113 S.Ct. 2680, 2685, 125 L.Ed.2d 321 (1993). After examining O'Dell, Dr. Kreider, the court-appointed psychiatrist, questioned the reliability of an earlier diagnosis of schizophrenia, J.A. at 2666, and concluded that O'Dell was competent "to make a voluntary and intelligent decision to waive his right to counsel and prepare his own defense," J.A. at 312, an assessment with which both O'Dell's attorney and the trial court agreed. J.A. at 2511, 2709, 2712. Moreover, because Dr. Kreider was familiar with the standard for finding a defendant competent to stand trial, J.A. at 313, 2642-45, 2682-83, and because that standard is identical to the standard for waiving the right to counsel, *Godinez*, 509 U.S. at 397, 113 S.Ct. at 2685, Dr. Kreider's determination was more than adequate, as both the state and federal *habeas* courts found. J.A. at 2760, 2776-77, 313-14.

Second, O'Dell claims that his competency was never appropriately determined because Dr. Kreider is a "therapeutic psychiatrist" and not a "forensic psychiatrist." Although O'Dell cites *Ake* for the proposition that "[w]hen the mental state of a defendant is at issue, due process requires that a defendant be provided with a qualified expert psychiatrist to assist with his defense," Petitioner's Br. at 61, he misreads *Ake* to establish a general due process right to psychiatric assistance where none exists. In *Ake*, the Court held only that,

cause and prejudice. That the default was only procedural, does nothing to insulate the claims from this bar. As Justice O'Connor explained for the Court in *Coleman*,

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> when a defendant demonstrates to the trial judge that his *sanity at the time of the offense* is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in . . . the defense.

470 U.S. at 83, 105 S.Ct. at 1096 (emphasis added). *Ake* thus says nothing about determining "competency" to stand trial or waive counsel; it deals only with a defendant's "sanity" at "the time of the offense," as the state *habeas* court properly held, J.A. at 2776. And in *Godinez*, the Court noted that a court is *not*

> required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his right to counsel. As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence.

Godinez, 509 U.S. at 401 n. 13, 113 S.Ct. at 2688 n. 13.

Regardless, Dr. Kreider was more than qualified to make the competency determination; he has an M.D. from the University of Chicago School of Medicine, has completed a psychiatric residency at the Philadelphia Naval Hospital, and has served as a psychiatrist in the Navy and in private practice from 1965 to the present. J.A. at 2640-42. Both the state and federal *habeas* courts found Dr. Kreider fully qualified to make the competency determination.

Finally, O'Dell claims that his conviction must be vacated because he did not waive his right to counsel voluntarily, knowingly, and intelligently. O'Dell claims that the district court's refusal to replace defense counsel, with whom O'Dell had a confrontational and distrustful relationship, left O'Dell "no choice" but to dismiss counsel and proceed *pro se*. But "[t]he

> we [sic] [have repeatedly] emphasized the important interests served by state procedural rules at every stage

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determination of whether or not the motion for substitution of counsel should be granted is within the discretion of the trial court." *United States v. Gallop*, 838 F.2d 105, 108 (4th Cir.), *cert. denied*, 487 U.S. 1211, 108 S.Ct. 2858, 101 L.Ed.2d 895 (1988). The trial judge was in a far better position than a federal *habeas* court to assess the relationship between O'Dell and his attorney. As the trial court stated on the record,

> [f]rom everything I've seen, since Mr. Ray was appointed in this case, he's done everything in his power to get those material things that should be heard before the Court for a hearing, and I've absolutely no evidence whatsoever that this man hasn't done an outstanding job for you at this point or that there is any credibility whatsoever in the allegations which you have made with respect to him. None whatsoever.

J.A. at 319; *see also* J.A. at 3008. Although his opinion on Ray varied, at times, O'Dell also shared this assessment of Ray's competency. J.A. at 435, 2513, 3008; Tr. 9/8/86 Vol. 53, 201-02. In any event, the trial court found that O'Dell was receiving adequate counsel and accordingly refused to substitute counsel. And, "once the trial court has appropriately determined that a substitution of counsel is not warranted, the court can insist that the defendant choose between continuing representation by his existing counsel and appearing *pro se*." *Gallop*, 838 F.2d at 109.

It also appears that O'Dell's waiver was knowingly and intelligently made. The trial court repeatedly warned O'Dell of the dangers of proceeding *pro se*, O'Dell was repeatedly asked if he understood what he was doing, and the court even allowed him to change his mind several times. J.A. at 318-19, 3007-08, 3011-12, 3016, 3021-22, 3332-33, 3340. If there was any problem in the attorney-client relationship, it was likely caused by O'Dell. As the federal *habeas* court concluded, "O'Dell's distrust of Ray was not based on objective facts; it was based on pure speculation." J.A. at 320.

of the judicial process and the harm to the States that results when federal courts ignore these rules: " . . . 'Each State's complement of procedural rules . . . channel[s], to the extent possible, the resolution of various types of questions to the stage of judicial process at which they can be resolved most fairly and efficiently.' "

501 U.S. at 749, 111 S.Ct. at 2564 (quoting *Murray v. Carrier*, 477 U.S. 478, 490-91, 106 S.Ct. 2639, 2646-47, 91 L.Ed.2d 397 (1986) (quoting *Reed v. Ross*, 468 U.S. 1, 10, 104 S.Ct. 2901, 2907, 82 L.Ed.2d 1 (1984))). Nor does the fact that O'Dell's failure to timely file the required petition for appeal was almost certainly unintentional insulate him from the consequences of that failure:

> By filing late [petitioner] defaulted his entire state collateral appeal. This no doubt an inadvertent error, and [Virginia] concedes that [petitioner] did not "understandingly and knowingly" forgo the privilege of state collateral appeal. . . . [Nonetheless] federal habeas review of the claims is barred [absent cause and prejudice].

Id. at 749-50, 111 S.Ct. at 2564-65.

B.

Having concluded that O'Dell procedurally defaulted nineteen of his claims (the nine under *Slayton* and the ten

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And, an independent and thorough examination of the record reveals that O'Dell, who was "very intelligent," had a college equivalency education, and "exhibit[ed] tremendous [courtroom] skills," J.A. at 3011, 2406, 3333, defended himself far more ably than many practicing attorneys could have done.

under Rule 5:17(a)(1)), we now address whether the federal *habeas* court could nevertheless consider those claims on the merits. As the Court held in *Coleman*,

> [i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

501 U.S. at 750, 111 S.Ct. at 2565.

On appeal, O'Dell does not even attempt to demonstrate cause and prejudice; instead, he argues that failure to consider his defaulted claims will result in a "fundamental miscarriage of justice" because he has presented new evidence of "actual innocence." O'Dell's claim "of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins*, 506 U.S. 390, 404, 113 S.Ct. 853, 862, 122 L.Ed.2d 203 (1993).[25]

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[25] Although O'Dell asserts that this new evidence is enough to meet the "extraordinarily high" threshold of a freestanding constitutional claim of actual innocence, *Herrera*, 506 U.S. at 417, 113 S.Ct. at 869, he devotes only one sentence of his voluminous briefing to this issue. *See* Petitioner's Br. at 52. Assuming *arguendo* that such a claim is even possible, *but see Herrera*, 506 U.S. at 416-17, 113 S.Ct. at 868-69, we agree with the district court that O'Dell did not come even close to making such a "truly persuasive demonstration." J.A. at 297.

Last Term, the Supreme Court held that the proper test for whether a *habeas* petitioner has established that his case is "extraordinary" enough to fall into that "narrow class of cases," which "implicat[e] a fundamental miscarriage of justice," *McCleskey v. Zant*, 499 U.S. 467, 494, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991), is whether that petitioner has shown that "a constitutional violation has *probably resulted* in the conviction of one who is actually innocent." *Schlup v. Delo*, ___ U.S. ___, ___, 115 S.Ct. 851, 867, 130 L.Ed.2d 808 (1995) (quoting *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986)) (emphasis added).[26] Thus, in order to

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[26] The Commonwealth argues that a claim of actual innocence cannot succeed unless the petitioner demonstrates that "but for a constitutional violation" his actual innocence would have been established. Respondent's Reply Br. at 19. Because none of the procedurally barred constitutional claims prevented the jury from hearing the DNA evidence or any of the other evidence O'Dell claims proves his innocence, the Commonwealth maintains that they cannot be reviewed regardless of the new evidence.

Prior to *Schlup*, our circuit did require petitioners to link their exculpatory evidence to a specific constitutional error that prevented the jury from adequately considering the evidence. *See Spencer v. Murray*, 18 F.3d 229, 236 (4th Cir.1994). *Spencer*, however, rested on *Sawyer*, which was rejected by *Schlup* for claims of actual innocence of the crime itself. *Schlup* makes no mention of a "but for" requirement, but it does note in *dictum* that an actual innocence claim that "accompanies" an "assertion of constitutional error at trial," is reviewable. *Schlup*, ___ U.S. at ___, 115 S.Ct. at 861. Although the plurality in *Schlup* did not use the term "but for," neither did the Court expressly abandon it. And, the Court continued to rely on *Carrier* and *McCleskey*, both of which require that a constitutional violation "probably" "result" in (*Carrier*) or "cause" (*McCleskey*) the conviction of one actually innocent. *See id.* at ___, 115 S.Ct. at 867. Because we conclude that, regardless, O'Dell has not presented sufficient evidence to demonstrate actual innocence, we need not reach whether a "but for" requirement remains after *Schlup*.

have his procedurally defaulted claim reviewed nonetheless on federal *habeas*, O'Dell must show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."[27] *Id.*

The new evidence that O'Dell proffers as support for his claim of actual innocence is a recently conducted DNA test of blood found on O'Dell's clothing. In his statement accompanying the denial of *certiorari* on direct review of the state *habeas* denial, Justice Blackmun expressed the view that "there are serious questions as to whether O'Dell committed the crime" in light of this DNA evidence. *O'Dell*, 502 U.S. at 998, 112 S.Ct. at 619 (Blackmun, J.). Because of these concerns detailed in Justice Blackmun's statement respecting denial of *certiorari*, J.A. at 300, the federal district court conducted a full evidentiary hearing on the DNA evidence. At that hearing, O'Dell presented the results of DNA tests performed

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[27] Even if petitioner makes this showing, it may still be within the court's discretion to decline to review his procedurally defaulted claims. As Justice O'Connor observed in *Schlup*, "the Court d[id] not, and need not, decide whether the fundamental miscarriage of justice exception is a discretionary remedy." ___ U.S. at ___, 115 S.Ct. at 870 (O'Connor, J., concurring). And, of course, under *Marks*, Justice O'Connor's reservation of this issue causes it to necessarily "be an accurate description of what the Court . . . *holds*, since the narrower ground taken by one of the Justices comprising a five-Justice majority becomes the law." *Schlup*, ___ U.S. at ___ n. 1, 115 S.Ct. at 875 n. 1 (Scalia, J., dissenting).

on his blood-soaked clothing some five years after the crime, in an effort to refute the evidence at his original trial that the blood stains were consistent with Helen Schartner's blood but not with his own.

1.

At O'Dell's original trial, the Commonwealth's expert Jacqueline Emrich testified at length about the numerous tests she performed upon the various relevant blood stains.[28] In addition to testing for standard ABO blood type, Emrich tested for the following ten enzymes: EsD, PGM, PepA, GLO, EAP, AK, ADA, GC, Tf, and Hp. J.A. at 1851. Ms. Emrich tested blood stains on O'Dell's blue jacket, and found them consistent with Helen Schartner's blood and inconsistent with O'Dell's. J.A. at 1857. She likewise tested three separate stains on O'Dell's checkered shirt, and found them all consistent with Schartner's blood but not O'Dell's. J.A. at 1859-60. And

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[28] O'Dell now attacks Emrich as a "neophyte," claiming that her testimony should be discounted. However, it is not clear on the record that O'Dell challenged her qualifications at trial, J.A. at 1827, and regardless, the Virginia Supreme Court expressly found that "the trial court did not err in admitting in evidence the results of the electrophoretic tests," *O'Dell*, 364 S.E.2d at 504. The state *habeas* court heard testimony that Ms. Emrich's "work has always been outstanding," J.A. at 2752, and found that "the Supreme Court of Virginia has already ruled that the serological evidence produced at trial was competent and properly admitted into evidence and considered by the jury. *It is not the function of the writ of habeas corpus to undertake to serve as an appellate court over the decision reached by the Supreme Court,*" J.A. at 2777-78 (emphasis added). Likewise, we, too, on federal *habeas*, are bound by the Virginia Supreme Court's finding.

she tested two stains on O'Dell's tan jacket, finding them both consistent with Schartner's blood but not O'Dell's. J.A. at 1861. Additionally, Ms. Emrich tested O'Dell's jeans; most of the Helen Schartner's torn clothing; a sardine can; a red cloth; and the right front seat back, the right seat back, the seat cover, the left seat back, and the right rear floormat of O'Dell's car – *all* of which revealed blood stains consistent with Helen Schartner's blood but not with O'Dell's. J.A. at 1862-75.

Helen Schartner had type O blood; O'Dell has type A. J.A. at 1850, 1852. Five of the their enzyme markers were the same, and five were different. J.A. at 1853-55. Although not all ten enzymes types were identifiable from every single stain, each stain mentioned above proved to be type O blood and matched Helen Schartner's blood (in a way inconsistent with O'Dell's) for *every single identifiable enzyme*. In addition, Ms. Emrich also found one other blood stain in O'Dell's car that was different from both Schartner's and O'Dell's blood. J.A. at 1871.

2.

Five years after the trial, O'Dell requested permission to have DNA testing performed on the evidence that was introduced at trial, testing which was not commonly available when he was tried in 1986. The Commonwealth consented, and O'Dell proposed that the evidence be sent to LifeCodes laboratory. The Commonwealth again consented. J.A. at 2895. LifeCodes was only able to test the shirt and the blue jacket, because the blood samples on the remaining items had deteriorated too much in the five

years to be of use. *See* Petitioner's Reply Memorandum in Support of Motion to Supplement Oral Argument at 3 & Ex. A. The LifeCodes Report concluded that the blood stain on the shirt "can be excluded as having a common origin" with either Helen Schartner's or O'Dell's blood, but that *the blood on the blue jacket "matched the DNA-PRINT pattern from the blood of Helen Schartner."* J.A. at 2990 (emphasis added).

Before the state *habeas* court, and again before the federal *habeas* court, O'Dell presented expert testimony embracing the first LifeCodes conclusion and attacking the second. Specifically, his experts testified that, based upon their own evaluation of the LifeCodes data, the variations between the blood on the blue jacket and Schartner's blood exceeded LifeCodes' own match criterion of 1.8%, and so the jacket should be considered "inconclusive" rather than a "match." J.A. at 2602, 2860, 2871.

The Commonwealth's experts agreed that the DNA tests proved that the blood on O'Dell's shirt came from neither Schartner nor O'Dell, but they testified that the LifeCodes data demonstrate that the blood on the blue jacket matched Helen Schartner's blood, for two reasons. First, as O'Dell's experts were forced to largely concede, J.A. at 2869-71, the DNA patterns on the blue jacket fell well within the state laboratory's and the FBI's match criterion of 2.5%. J.A. at 2728, 2731, 2802, 2808, 2812-13, 2838. And second, as O'Dell's experts again had to concede, J.A. at 2871-72, "band shifting" and "partial degradation," had occurred in the samples and could account for the differentials, J.A. at 2804, 2821, 2839-40, 2990 –

which is why LifeCodes performed further tests and ultimately concluded the blue jacket was a "match," J.A. at 2732-33, 2738-39, 2840, 2891, 2990.

O'Dell's experts, in turn, had two responses. First, under the standards of the National Research Council – described by the Commonwealth's expert as a committee issuing "recommendations," not "accepted by the scientific community generally," and currently under revision because "over 300 distinguished scientists" petitioned for their modification due to inaccuracies, J.A. at 2827-30 – "[e]ach laboratory should determine their own match criteria." J.A. at 2832, 2857. *But see* J.A. at 2738, 2853. Therefore, O'Dell's experts argued, it was improper for the Commonwealth's experts to substitute the state laboratory's and the FBI's match criteria for LifeCodes' (although it was apparently proper for them to substitute their *conclusion* for LifeCodes'). Second, according to O'Dell's experts and that same NRC Report, use of a monomorphic probe – upon which LifeCodes relied to correct the conceded band shifting, J.A. at 2839-40 – is ineffective to correct band shifting. J.A. at 2840-43, 2872. Of course, O'Dell's primary expert, Dr. Spence, a medical geneticist, performed approximately 98% of his work in a clinical environment where, if band shifting occurred, he could simply take another sample from his living patients. J.A. at 2880-87, 2598, 2604-05. The Commonwealth's expert countered, "[i]n the forensic field . . . we only have so much of the sample. It is not like in the clinical laboratory environment where you have a lot of blood where you can go back and repeat a sample. . . . [Therefore] [w]e don't ignore [band shifting and partialling; we try to correct them]." J.A. at 2846-47, 2742-43.

3.

The federal *habeas* court's factual findings regarding this testimony are not particularly helpful,[29] but the court did expressly credit O'Dell's experts concerning the impropriety of substituting the state crime lab's and the FBI's match criterion for LifeCodes'. J.A. at 308. The district court further commented that use of monomorphic probes to correct for band shifting is "controversial" *Id.* (citing *People v. Keene*, 156 Misc.2d 108, 591 N.Y.S.2d 733 (N.Y.Sup.Ct.1992)). Together, these two findings suggest that it agreed that the stains on the jacket were "inconclusive."

Nevertheless, the district court was forced to conclude, J.A. at 308, under the legal standard then in force, that O'Dell's new evidence failed to establish actual innocence, because it did not demonstrate "by clear and convincing evidence that but for constitutional error, no reasonable juror would have found the petitioner" guilty

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[29] The federal *habeas* court concluded, "[b]ased on the evidence at the evidentiary hearing, the blood on the jacket and the blood on the checkered shirt can be excluded as having a common origin. Again, based on the evidence, the DNA comparison of the blood on the checkered shirt and the victim's blood yielded a result that is 'inconclusive.' " J.A. at 307-08. This conclusion is unhelpful and, indeed, is somewhat odd, in that it restates an issue that nobody disputes, states another that is contrary to the evidence, and ignores the hotly contested issue in the testimony. Every expert agreed that the stain on the *shirt* could be "excluded" from coming from Schartner, yet the district court characterizes the comparison as "inconclusive." However, the real issue in dispute – whether the stain on the *jacket* was a "match" or "inconclusive" – was ignored in the district court's conclusions.

of murder. This standard, established by the Court in *Sawyer v. Whitley*, 505 U.S. 333, 336, 112 S.Ct. 2514, 2517, 120 L.Ed.2d 269 (1992), for claims of actual innocence of the death penalty, was adopted by this circuit for claims of actual innocence of the underlying crime as well. *Spencer*, 18 F.3d at 236. Of course, the Court subsequently rejected application of the *Sawyer* standard to actual innocence claims at the guilt phase of trials, instead adopting the more lenient test of *Murray v. Carrier*, 477 U.S. at 496, 106 S.Ct. at 2649: whether petitioner has shown that " 'a constitutional violation has probably resulted in the conviction of one who is actually innocent,' " that is, whether "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, ___ U.S. at ___, 115 S.Ct. at 867 (quoting *Carrier*).

Because the federal district court applied *Sawyer* instead of *Carrier*, and because the court did in a footnote *dictum* find that O'Dell would have met a less demanding standard of "a 'fair probability' that, in light of all probative evidence available at the time of his federal evidentiary hearing, 'the trier of the facts would have entertained a reasonable doubt of his guilt,' " J.A. at 308 n.18, O'Dell argues that, at the very least, we must remand the case to the district court to determine whether O'Dell's evidence meets the newly applicable standard. Under the particular facts of this case, however, and given that the district court has already made the kinds of findings that are peculiarly within its province, we disagree.

The "fair probability" standard relied upon by the district court in its *obiter dictum*, drawn from Justice Powell's plurality opinion in *Kuhlmann v. Wilson*, 477 U.S. 436, 454 n. 17, 106 S.Ct. 2616, 2627 n. 17, 91 L.Ed.2d 364 (1986),

is "similar" to the *Carrier* standard, *Schlup*, ___ U.S. at ___, 115 S.Ct. at 863, and has been treated as functionally the same, *id.* at ___-___, 115 S.Ct. at 864-65. Under *Schlup*, though, it is the *Carrier* formulation that is now controlling: Has O'Dell established that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence?" *Id.* at ___, 115 S.Ct. at 867.

This question is a mixed question of fact and law;[30] indeed, the dissent in *Schlup* characterized it as

> a classic mixing of apples and oranges. "More likely than not" is a quintessential charge to the finder of fact, while "no reasonable juror would have convicted him in the light of the new evidence" is an equally quintessential conclusion of law. . . .

Id. at ___, 115 S.Ct. at 873 (Rehnquist, C.J., dissenting). Because this "hybrid . . . is bound to be a source of confusion," *id.*, we pause to attempt to fathom it fully.

The district court, in making this determination, must look at two elements: first, all of the evidence that the jury heard at trial, and second, the newly proffered evidence. *See Schlup*, ___ U.S. at ___, 115 S.Ct. at 867. If it were to look at only the former, and to ask only whether no reasonable juror could have convicted, then it would

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[30] Justice O'Connor, a necessary member of the majority in *Schlup*, made clear that the Court did not "disturb the traditional discretion of district courts in this area, nor d[id] it speak to the standard of appellate review for such judgments." ___ U.S. at ___, 115 S.Ct. at 870 (O'Connor, concurring). Because the district court abused its discretion by applying the wrong legal standard, the Court did not address whether any less deferential standard of review need apply. *Id.*

be doing nothing more than evaluating the sufficiency of the evidence under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), a question of law reviewable *de novo*. But the *Carrier* inquiry is different from that under *Jackson* in two respects. First, it is asking not whether no reasonable juror *could* convict – a question of "power" – but whether no reasonable juror *would* convict – a question of "likely behavior." *Schlup*, ___ U.S. at ___, 115 S.Ct. at 868. Thus, the *Carrier* standard "requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Id.* Second, *Carrier* adds to the calculus the quantum of new evidence that the petitioner presents, evidence whose credibility must be determined and evidence which may call into question the credibility of prior evidence presented at trial. *Id.* at ___-___, 115 S.Ct. at 868-69.

Ascertaining the credibility of evidence is "quintessentially" a task for the fact-finder, and so the district court's factual findings regarding the credibility of testimony it has actually heard are findings subject to review only under a clearly erroneous standard. But the federal district court is in no better position than an appellate court to then add that new evidence to the evidence that was presented at trial or to speculate as to the likelihood that no reasonable juror would convict based on the sum of all the evidence. Both courts, reviewing a cold trial record, must determine whatever inferences and deductions logically and reasonably can be made from all of the evidence and then, to the best of their ability, guess as to the likelihood that *no* reasonable juror would make those inferences necessary for conviction. This is in some sense

an application of "law" to facts. In any event, we believe that such determinations are, for lack of a better word, "mixed" questions of law and fact, and so are reviewable *de novo*.

In *Schlup* the Court remanded to the Court of Appeals with instructions to remand to the district court, but it did so there only because that was "the most expeditious procedure" in light of the "fact-intensive nature of the inquiry, together with the District Court's ability to take testimony from the few key witnesses if it deems that course advisable." ___ U.S. at ___, 115 S.Ct. at 869. In *Schlup*, "both the Court of Appeals and the District Court [had] evaluated the record under an improper standard," *id.*, and the district court had heard no testimony whatsoever, *id.* at ___, 115 S.Ct. at 854. Here, in contrast, the district court has conducted a full evidentiary hearing, made adequate factual findings, and we are now able to apply the correct legal standard on appeal.

Because the district court made sufficient factual findings as to the credibility of the witnesses that it heard, and because the remaining portion of the *Carrier* inquiry is simply an application of law to the combination of those facts and the trial record facts, we turn ourselves to the question of whether O'Dell has established that it is more likely than not that no reasonable juror would convict him.

4.

We do not believe that O'Dell has come even close to meeting either the *Kuhlmann* standard or the "similar"

Carrier standard. A reasonable juror examining all of the evidence would have confronted the following.

First, the mountain of circumstantial evidence. On the night of the murder, both O'Dell and Schartner were at the County Line Lounge. O'Dell left the club within fifteen minutes of when Schartner left.[31] Not more than two and a half hours later, O'Dell appeared at a convenience store with blood on his face, hands, hair, and clothes. The next morning, O'Dell informed his former girlfriend that he was going to Florida, and, several hours later, Schartner's bloody body was found in a field across the street from the County Line Lounge.

O'Dell's first explanation for being covered in blood, which he gave his former girlfriend that next morning and which he now admits was a lie, was that he had vomited blood all over himself. His second explanation, which he told the police when he was arrested, was that the blood was from a nose bleed caused by being struck when he attempted to stop a fight at another club that same night.[32]

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[31] In his briefing, O'Dell persists on disputing the time he left the club, relying on trial testimony that he was there over a half hour after Schartner left. *See* Petitioner's Br. at 47. But the Virginia Supreme Court expressly found that O'Dell left within fifteen minutes of when Schartner left, *O'Dell*, 364 S.E.2d at 495, and, under section 2254(d) and *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), we must accept that factual finding, supported by substantial evidence, as true.

[32] O'Dell maintains that this second story is true and that trial testimony supported it. For this proposition, *see* Petitioner's Br. at 7, O'Dell cites his own federal writ of *habeas corpus*, J.A. at 35. His writ in turn cites trial testimony, not that

Helen Schartner's head had been beaten brutally with a "linear cylindrical object." J.A. at 1414. O'Dell had been seen about a week earlier with a pellet gun in his car, J.A. at 1531-36, and medical testimony established that Schartner's wounds were consistent with the weight and shape of that type of pellet gun, J.A. at 1413-17. Moreover, tire tracks found at the crime scene had the "identical" design elements as the tires on O'Dell's car, J.A. at 1258, 1266. *After examining patterns for some two thousand different tires and four or five thousand different design units, the Commonwealth's expert could not find a single tire, other than O'Dell's, that matched the tire tracks found at the scene.* J.A. at 1258-59, 1263.

Additionally, the direct physical evidence linking O'Dell to the murder is overwhelming. On the right front seatcover of O'Dell's car, investigators found a head hair consistent with Helen Schartner's but not with O'Dell's hair. J.A. at 1912-13. On the "left seat driver's seat back cover" of O'Dell's car, investigators found two hairs consistent with Schartner's head hairs and inconsistent with

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O'Dell was bloodied breaking up a fight, but merely that a fight had occurred at the Brass Rail bar that night and that when the supervisor went outside he did not see anyone other than O'Dell, who was covered in blood. O'Dell then claimed that the persons who had been fighting had left.

O'Dell concedes that this is contrary to the story he told Connie Craig, J.A. at 2432, but maintains that he lied to Craig only to prevent her from telling his parole officer he had been fighting at the bars, as she had done on a previous occasion. Of course, Craig testified that O'Dell went to the County Line Lounge on "practically" every Tuesday, J.A. at 1098, and that *he had told her he had been at the County Line Lounge on the very night in question*, J.A. at 1093-94, 1098.

O'Dell's, three hairs consistent with O'Dell's head hairs and inconsistent with Schartner's, and two hairs consistent with neither's. J.A. at 1913-14. And, on the right front floor mat of O'Dell's car, investigators found one hair, *consistent with Helen Schartner's pubic hair, and not with O'Dell's.* J.A. at 1914-15.

Investigators also found, in Schartner's vagina and anus and on O'Dell's shirt, seminal fluid that was consistent with a mixture of O'Dell's and Schartner's bodily fluids. J.A. at 1889-96. O'Dell on this appeal argues strenuously that the alleged "mixture" of bodily fluids found in Schartner's anus shows that he could not have raped her, because Schartner could not secrete vaginal fluids from her anus. Not only is O'Dell not free to challenge this now on federal *habeas* (because he has proffered no new evidence relating to the seminal fluids and the Virginia Supreme Court expressly found that the vaginal and anal fluids were consistent with O'Dell's, *O'Dell*, 364 S.E.2d at 495), he is wrong in any event. As the Commonwealth's expert Ms. Emrich explained at trial, and as O'Dell's appellate counsel apparently misunderstands, the fluid found in Schartner is the predictable result of mixing fluids from two secretors, like Schartner and O'Dell. J.A. at 1881-84.

Secretors are persons whose bodily fluids carry with them characteristics of their blood type; both Schartner and O'Dell were secretors. Schartner's blood type was O, and her PGM type and PepA type (the two enzymes that are evident in bodily fluids) were 2-1 and 1, respectively. O'Dell's blood type is A, his PGM type 1, and his PepA type 1. Because both Schartner and O'Dell had the same

PepA type (1), the presence of that enzyme is not particularly revealing. The other two types, however, are quite revealing.

As Emrich explained, both blood types and enzyme types function in essentially the same way. Blood type A indicates the presence of the A antigen, type B indicates the presence of B, AB indicates the presence of both, and O indicates the presence of neither. If you mix A with B, the mixture is AB; if you mix either A or B with AB, the mixture is still AB; and if you mix A or B or AB with O, the mixture is A, or B, or AB (depending on which you added to O). Likewise, there are three common types of PGM, 1, 2, and 2-1. Type 2-1, like blood type AB, is simply a combination of types 1 and 2. Thus, if you mix 1 with 2, the combination is 2-1, as is the combination of either 1 or 2 with 2-1. J.A. at 1881-88.

In Schartner's vagina, Emrich found seminal fluid indicating blood type A, PepA 1, and PGM 2-1. J.A. at 1889-90. The blood type (A) is consistent with a mixture of O'Dell's (A) and Schartner's (O) bodily fluids, the PepA type is consistent with both of their fluids, and the PGM type (2-1) is consistent with a mixture of O'Dell's (1) and Schartner's (2-1) bodily fluids. J.A. at 1890. That same mixture was found in Schartner's anus, J.A. at 1891-92, and on three stains on O'Dell's shirt, J.A. at 1895-96.

Even more incriminating were the spermatozoa found in Schartner's genital swabs and in her genital scrapings. Those spermatozoa were blood type A, PepA 1, and PGM 1, consistent with O'Dell's blood and enzyme types and not with Schartner's. J.A. at 1893-94. *Thus, the*

spermatozoa, which could only have come from a man, matched perfectly the sperm cells of Joseph O'Dell, and the seminal fluid, which presumably came from the same man who produced the spermatozoa, was entirely consistent with a mixture of O'Dell's and Schartner's bodily fluids.

And herein lies the obvious failing in O'Dell's argument. O'Dell maintains that, because seminal fluid type A, PepA 1, PGM 2-1, was found in Schartner's anus, and because the anus does not secrete vaginal fluids (and, presumably, he for some reason also asserts, by silent implication and without evidence, that there are no other bodily secretions in the anus), the man who raped Schartner must have had type A, PepA 1, PGM 2-1 semen, not type A, PepA 1, PGM 1 like O'Dell's. But, as the expert testimony explained, seminal fluid is capable of mixing with other fluids to pick up their markers; the spermatozoa, on the other hand, were the man's alone, and they were type A, PepA 1, PGM 1. Unless we are to indulge the fanciful possibility that the sperm and the seminal fluid found in Schartner came from different men, the only reasonable implication from this is that the rapist's sperm and seminal fluid (prior to mixing with Schartner's fluids) were both originally type A, PepA 1, PGM 1 – exactly like O'Dell's.

In addition, a reasonable juror would also consider the testimony of Steven Watson, to whom O'Dell confessed to murdering Helen Schartner. Watson testified that O'Dell told him in jail that he had met Schartner at the County Line Lounge, bought her a few drinks, took her riding in his green Camaro, tried to "get a little" from her, and, when she refused to "give it up," strangled her and dumped her body. J.A. at 1674, 1685. Watson also testified

that O'Dell had told him that "he was going to walk on the charge" because "they didn't have no evidence" and "no one had actually seen him kill her." J.A. at 1675, 1686. Watson further testified that he had never seen anything about the murder on television or in the newspaper, J.A. at 1675, 1686, and that he had neither been offered nor received anything in return for his testimony, J.A. at 1675-76, 1680-82.

The jury heard at great length about Watson's prior convictions, and O'Dell cross-examined him and other witnesses repeatedly attempting to uncover any deal between Watson and the authorities. J.A. at 1680-81, 1689-96, 2023-24, 2050. In addition, the jury heard about the recent charges against Watson's wife that had been dropped and against Watson that had been plea bargained to three years probation, J.A. at 1689-92, and it heard testimony from a state trooper that Watson "wanted a deal," meaning "he didn't want to go to prison," J.A. at 2050. Nonetheless, the Virginia Supreme Court expressly found that "O'Dell was unable to prove a plea agreement existed between Watson and the Commonwealth." *O'Dell*, 364 S.E.2d at 498 n. 4.[33]

And, finally, there was all of the blood evidence introduced at trial. The Commonwealth's expert, Ms. Emrich testified at length regarding the great quantities of blood found on O'Dell's clothing and car, all of which was consistent with Schartner's blood and inconsistent

[33] O'Dell claims to have new evidence now substantiating his claim that Watson had cut a deal, but that evidence does little to prove that claim. *See* discussion *infra* at 1254-1255.

with O'Dell's. *See supra* at 1247. Helen Schartner's combination of blood and enzyme type occurs in .3% (three out of a thousand) of the population; O'Dell's occurs in .08% (eight out of ten thousand). J.A. at 1921. The DNA evidence that O'Dell introduced at the federal *habeas* hearing was in no way inconsistent with that testimony, J.A. at 2815, as even O'Dell's expert was forced to concede, J.A. at 2636, 2878.[34] DNA testing is simply more discriminating than electrophoretic testing; the latter limits a blood sample to a range of people (in this case, .3% of the population), whereas the former can limit it to just one individual. J.A. at 2815, 2878.

Plus, a reasonable juror would have been confronted with O'Dell's new DNA evidence. That juror would have seen the LifeCodes Report, the Commonwealth's experts, and O'Dell's expert all agreeing that one of the stains on his shirt was from neither O'Dell nor Schartner. Of course, this evidence would have contradicted O'Dell's "alibi," that the blood on his clothing came from his own

[34] Dr. Guerrieri, an expert for the Commonwealth, explained at the state *habeas* hearing yet another way how the DNA exclusion of the shirt could still be consistent with the enzyme match on that same shirt:

> One possibility would be that there are two different sources of genetic material in that particular stain; that is to say in the DNA testing, as well as the serology testing, a large portion of the stain is often consumed in the analysis. So if you sample one region – if Miss Emerich [sic] sampled one region in a particular location, and the commercial testing lab sample[d] adjacent to that, it's conceivable they could have been two different blood sources.

J.A. at 2751-52.

nose when he was struck stopping a bar fight.[35] *And the juror would have reviewed the LifeCodes DNA report conclusively stating that the blood on O'Dell's jacket was Helen Schartner's.* To be sure, that juror would also have been confronted with the conflicting testimonies of the Commonwealth's and O'Dell's experts concerning the inferences to be drawn from the data upon which LifeCodes relied, and, because the federal district court found that the blood on the jacket was "inconclusive," we assume that the testimony of O'Dell's expert was at least credible. But nonetheless, a reasonable juror would have been presented with all the evidence: the LifeCodes report (stating conclusively that DNA proved the blood was Schartner's), the Commonwealth's expert's testimony (stating that the data, even unadjusted for band shifting, fell within the Virginia crime lab's and the FBI's criteria for a positive DNA match), and O'Dell's expert (agreeing that band shifting had occurred but arguing that the blood evidence was "inconclusive" because it fell slightly outside LifeCodes' unadjusted match criterion of 1.8%).

And, finally, a reasonable juror could have considered that O'Dell had been previously convicted in Florida

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[35] Although his brief before this court argues that, during the alleged fight at the Brass Rail, he "became covered *with the blood of the two other individuals,*" Petitioner's Br. at 7, the only support it cites for that proposition is his own federal petition for *habeas corpus*. That petition, in turn, states simply that "[d]uring the course of this fight, O'Dell's clothes became covered with blood." J.A. at 35. Regardless, the Virginia Supreme Court expressly found "O'Dell told the police the blood came from *a nose bleed caused by being struck while attempting to stop a fight* at another club," *O'Dell*, 364 S.E.2d at 495 n. 2 (emphasis added).

of a crime virtually identical to this one, and that he had been paroled, after serving eight years on a 99-year sentence, only fourteen months before Schartner was murdered. There, the victim testified that O'Dell had abducted her, robbed her, *struck her several times on the head with his gun*, and *choked her*, all in an effort to force her to submit to his sexual advances. *See O'Dell*, 364 S.E.2d at 510; J.A. at 2345-47. This testimony could very well have been admitted at trial as indicative of O'Dell's *modus operandi*, *see Spencer v. Commonwealth*, 240 Va. 78, 393 S.E.2d 609, 616-17, *cert. denied*, 498 U.S. 908, 111 S.Ct. 281, 112 L.Ed.2d 235 (1990); *cf.* Fed.R.Evid. 404(b); Weinstein's Evidence p 404[16] at 404-100 to 404-102, and, regardless of its admissibility, should properly be considered in assessing O'Dell's claim of "actual innocence," *Schlup*, ___ U.S. at ___, 115 S.Ct. at 867.

When viewing all of this evidence – being together at the County Line Lounge, leaving within fifteen minutes of each other, being covered with blood, planning to go suddenly to Florida, having inconsistent alibis, plus the wounds matching his gun, the tracks matching his tires, the hairs, the semen, the spermatozoa, the blood enzymes, the blood DNA on the jacket, the confession, and the nearly identical earlier crime – we do not believe it can even remotely be claimed that O'Dell has established that it is more likely than not that *no* reasonable juror would have convicted him. The only thing that O'Dell has demonstrated is that *one* of the many blood stains on his clothing did not come from either himself or Helen Schartner; that he also had someone else's blood on his shirt by no means shows that he did not murder Helen Schartner, particularly in light of the vast other

evidence that he did. We therefore hold that O'Dell has not passed through the "narrow" gateway of actual innocence, and so are barred from reviewing his procedurally defaulted claims on federal *habeas*.

IV.

O'Dell also challenges the federal district court's decision to grant him a full evidentiary hearing on only the DNA evidence, without allowing him to present other "new" evidence disputing the expert testimony at trial concerning the effect of intermingling bodily fluids, other unspecified circumstantial evidence linking him to the crime, and the testimony of cellmate Stephen Watson that O'Dell had confessed. We conclude that the district court was entirely within its discretion in so limiting the hearing.

O'Dell had the full opportunity to develop these factual bases in state court. In *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11, 112 S.Ct. 1715, 1721, 118 L.Ed.2d 318 (1992), the Supreme Court held that a federal *habeas* petitioner

> is entitled to an evidentiary hearing if he can show cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure.

The Court also "adopt[ed] the narrow exception to the cause-and-prejudice requirement," holding that

> [a] habeas petitioner's failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing.

Id. at 11-12, 112 S.Ct. at 1721. Except in regards to Watson's testimony, O'Dell makes no claim of cause or prejudice. Instead, he argues that it would be "a fundamental miscarriage of justice" not to hold an evidentiary hearing on these other claims. Petitioner's Br. at 53. For analogous reasons to those explained above, we do not believe O'Dell has come even close to demonstrating a fundamental miscarriage of justice from the district court's decision not to grant him an unrestricted evidentiary hearing.

O'Dell also claims that he has demonstrated cause and prejudice for his failure to develop the factual record in state court concerning Watson's testimony. O'Dell has continually maintained that Watson gave false testimony about O'Dell's confession in exchange for a plea agreement with the authorities, and he now proffers an affidavit of a private investigator who interviewed Watson some five years after the trial and claims to have uncovered some incriminating statements. O'Dell argues that Watson's alleged perjury and the prosecution's failure to correct that perjury (by disclosing that plea agreement as required by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)), along with the trial court's limitation of his cross examination of Watson, constituted cause for his failing to adequately develop the factual record before the state court.

We disagree. Although the alleged perjury and prosecution cover-up is external to O'Dell, the only "new" evidence he has is the affidavit from his investigator's interview of Watson. O'Dell has proffered no reason why his investigator was not able to interview Watson before

trial. Moreover, the state court allowed O'Dell considerable leeway in cross-examining Watson about any plea bargains or deals, and Watson repeatedly denied any such agreements. J.A. at 1680-81, 1689-96, 2023-24.

And, regardless, O'Dell could not possibly show any prejudice. First, his "new evidence" was of dubious value. The private investigator, who has never had his story subjected to cross-examination, claimed that Watson stated that he really did not know "how the girl was killed" (contradicting his trial testimony that O'Dell said he had strangled her), that O'Dell "could have been just bragging," and that "[t]o [his] knowledge, there was no deals, they didn't go through; . . . [He] did not know of any deals at all. [He's] not saying there wasn't, but [he himself] did not know of any." J.A. at 238-39 (emphasis omitted). None of these statements prove, or even suggest, the presence of a plea bargain, nor do they prove O'Dell's innocence, as the district court expressly found before concluding "the new evidence does not merit a hearing." J.A. at 345.

Second, even if it were of value, the evidence was almost certainly cumulative. The jury heard, at length, that Watson's family had a reputation for untruthfulness, that Watson was a seven-time convicted felon, that Watson and his wife had recently been facing criminal charges, that Watson had wanted "to make a deal" to avoid prison time, and that recent charges against Watson's wife had been dropped and Watson had received only three years probation on multiple breaking and

entering charges. We do not think that O'Dell's investigator's claims would have substantially increased the reasons that the jury had to doubt Watson's credibility and to scrutinize his story carefully.

Given the overwhelming other evidence of guilt detailed above, we are certain that nothing said by this investigator concerning Watson would have given any juror reasonable doubt as to whether O'Dell in fact murdered Helen Schartner on the night of February 5, 1985.

"Federal Courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391, 77 L.Ed.2d 1090 (1983). Here, the Virginia Supreme Court expressly found that,

> "[a]t trial, the court permitted O'Dell to fully develop all pretrial contacts and negotiations Watson had with the Commonwealth. O'Dell was unable to prove a plea agreement existed between Watson and the Commonwealth."

O'Dell, 364 S.E.2d at 498 n. 4. Under 28 U.S.C. § 2254(d), this factual finding is entitled to a presumption of correctness, and O'Dell has given us no "convincing evidence that the factual determination by the State court was erroneous."[36]

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[36] Because we reject O'Dell's claims on the grounds that we do, we need not consider his claims under the Anti-terrorism and Effective Death Penalty Act of 1996. Under that newly-enacted statute, O'Dell's claims, of course, would have even less merit, given the considerably more demanding standards therein imposed on *habeas* petitioners.

CONCLUSION

The judgment of the district court granting the petitioner's writ of *habeas corpus* is reversed, and the case is remanded with instructions to reinstate the death sentence. Likewise, the portion of the district court opinion finding that petitioner had not procedurally defaulted the claims that he failed to properly appeal from the state *habeas* court is reversed. The remainder of the district court opinion, finding that petitioner has not demonstrated actual innocence, is affirmed under the legal standard of *Schlup*.

REVERSED IN PART AND AFFIRMED IN PART.

ERVIN, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that the district court was correct in holding that O'Dell's challenges to his conviction are without merit, and I concur in those portions of the majority opinion affirming the district court's judgment denying O'Dell relief from his conviction.[1]

However, I must respectfully dissent from that part of the majority opinion holding that the district court erred in vacating O'Dell's death sentence on the basis of the Supreme Court's recent decision in *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). For the reasons that follow, I am persuaded that *Simmons* did not announce a "new rule" under *Teague v.*

[1] Like the majority, I also decline to address the question of the applicability of the Anti-terrorism and Effective Death Penalty Act of 1966 to this case.

Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and that the district court was also right in granting O'Dell relief from his sentence. I would, therefore, affirm the district court's judgment in its entirety, and I must dissent from the majority's failure to uphold that portion of the district court's decision.

I.

A.

In *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), the Supreme Court reversed a defendant's capital sentence after determining that his constitutional rights had been violated when the trial court refused to allow defense counsel to inform the jury that the defendant was statutorily ineligible for parole. During sentencing deliberations, the parole issue occurred to the jury, which asked the judge: "Does the imposition of a life sentence carry with it the possibility of parole?" *Id.* at ___, 114 S.Ct. at 2192. The trial judge responded that parole eligibility "is not a proper issue for your consideration." *Id.*

Before the United States Supreme Court, Simmons claimed that the trial court's refusal to inform the jury that he would be ineligible for parole had violated his rights under the Due Process Clause of the United States Constitution.[2] Seven Justices

[2] Simmons also raised a claim under the Eighth Amendment, the merits of which the Court's plurality opinion declined to address. *Simmons*, 512 U.S. at ___ n. 4, 114 S.Ct. at 2193 n. 4. Justice Souter, in a concurring opinion joined by

agreed.[3] Writing for a plurality that included Justices Stevens, Ginsburg, and Breyer, Justice Blackmun stated: "We hold that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Id.* at ___, 114 S.Ct. at 2190 (plurality opinion). Justice Blackmun's opinion appears to require that a court inform the jury *sua sponte* that the defendant will remain imprisoned for life, regardless of whether the defendant requests such an instruction.

We read the precise holding of *Simmons*, however, more narrowly. Justice O'Connor based her opinion concurring in the judgment, in which the Chief Justice and Justice Kennedy joined, on the "hallmark of due process" that a defendant is entitled to "meet the State's case against him." *Id.* at ___, 114 S.Ct. at 2200 (O'Connor, J., concurring in the judgment). As Justice O'Connor's opinion encapsulates the "position taken by those Members [of the Court] who concurred in the judgments on the narrowest ground," *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977), we use her statement of the *Simmons* "rule" as the benchmark for our analysis below: "Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury – by either argument or

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Justice Stevens, expressed a belief that the judgment reached by the court also was compelled by the Eighth Amendment. *Id.* at ___-___, 114 S.Ct. at 2198-99 (Souter, J., concurring).

[3] Justice Scalia wrote a dissent in which Justice Thomas joined. *Id.* at ___, 114 S.Ct. at 2201 (Scalia, J., dissenting).

instruction – that he is parole ineligible." *Id.* at ___, 114 S.Ct. at 2201 (O'Connor, J., concurring).

B.

The Commonwealth concedes that the facts of this case are indistinguishable from those in *Simmons*. As in *Simmons*, the trial court denied the defendant's request for an instruction on parole ineligibility, and, like Simmons, O'Dell was prohibited from rebutting the prosecution's argument that he would be dangerous in the future with evidence that he would be incarcerated for the remainder of his life. The Commonwealth attempts to distance itself from *Simmons* by arguing that the case announced a "new rule" of constitutional criminal procedure inapplicable on collateral review to O'Dell's already final conviction under the non retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion). Review of the district court's application of *Teague* is conducted *de novo*. *See Spaziano v. Singletary*, 36 F.3d 1028, 1041 (11th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 911, 130 L.Ed.2d 793 (1995).

As a general proposition, " 'a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.' " *Turner v. Williams*, 35 F.3d 872, 879 (4th Cir.1994) (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 (plurality opinion)), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1359, 131 L.Ed.2d 216 (1995). In *Caspari v. Bohlen*, 510 U.S. 383, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994), the Court set forth the following

three-pronged approach for determining what constitutes a new rule:

> First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must "[s]urve[y] the legal landscape as it then existed," and "determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle.

Id. at 390, 114 S.Ct. at 953 (citations omitted) (quoting *Graham v. Collins*, 506 U.S. 461, 467, 113 S.Ct. 892, 898, 122 L.Ed.2d 260 (1993), and *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257, 1260, 108 L.Ed.2d 415 (1990)). Proceeding through the *Caspari* analysis, we note first that O'Dell's conviction became final on October 3, 1988. *O'Dell v. Virginia*, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988). Our task, then, is to determine whether an objectively reasonable jurist in October 1988 would have felt compelled to conclude that the rule applied in *Simmons* was "required by the Constitution." *Turner v. Williams*, 35 F.3d at 880.[4]

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[4] We have found no authority from other federal appellate courts that addresses squarely the issue before us. In *Stewart v. Lane*, 60 F.3d 296 (7th Cir.1995), the Seventh Circuit held that *Simmons* was unavailable to a habeas petitioner whose convictions had become final on May 20 and May 28, 1985, because the case fell within those " 'gradual developments in the law over which reasonable jurists may disagree.' " *Stewart*, 60 F.3d at 302 (quoting *Sawyer*, 497 U.S. at 236, 110 S.Ct. at 2828). However, the *Stewart* panel expressly limited its holding to convictions that became final prior to the Supreme Court's decision in *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986):

> After reviewing the state of the law in May, 1985, we conclude that the rule sought by Stewart and recognized by the *Simmons* Court, was not dictated by existing precedent. *Simmons* relies primarily on *Skipper v. South Carolina* and *Gardner v. Florida*. Stewart cannot benefit from the rule of *Skipper*, however, because the Supreme Court rendered its decision in that case eleven months after Stewart's convictions became final.

Stewart, 60 F.3d at 300-301 (citations omitted). Given the centrality of *Skipper* to the claim before us, see *infra*, the decision whether Stewart's *Simmons* claim was *Teague*-barred was a closer one. Certainly, it does not dictate a decision in the factually distinct situation before us.

Two other circuits have declined to express an opinion on whether *Simmons* announced a new rule. *See Ingram v. Zant*, 26 F.3d 1047, 1054 n. 5 (11th Cir.1994) (distinguishing the facts before it from those in *Simmons*), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1137, 130 L.Ed.2d 1097 (1995); *cf. Allridge v. Scott*, 41 F.3d 213, 222 n. 11 (5th Cir.1994) (observing that the *extension* of *Simmons* sought by the petitioner would constitute a new rule under *Teague*), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1959, 131 L.Ed.2d 851 (1995).

The two major cases on which the *Simmons* Court principally relied had been decided in 1977 and 1986. *See Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and *Skipper v. South Carolina*, 476 U.S. 1, 106

S.Ct. 1669, 90 L.Ed.2d 1 (1986).[5] In *Gardner*, the Supreme Court ruled that the Due Process Clause does not permit the execution of a person "on the basis of information which he had no opportunity to deny or explain," in that case a presentence report kept from the defendant. 430 U.S. at 362, 97 S.Ct. at 1206. In *Skipper*, the Court elaborated on the principle it had announced in *Gardner* and held that a defendant's rights under the Eighth and Fourteenth Amendments were violated by the trial court's refusal to admit evidence of the defendant's good behavior in the penalty phase of his capital trial. 476 U.S. at 5 n. 1, 8-9, 106 S.Ct. at 1671 n. 1, 1672-73. According to the *Skipper* Court, "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty," elemental due process principles require the admission of the defendant's relevant evidence in rebuttal. *Id.* at 5 n. 1, 106 S.Ct. at 1671 n. 1; *see also id.* at 9, 106 S.Ct. at 1673 (Powell, J., concurring in the judgment) ("[B]ecause petitioner was not allowed to rebut evidence and argument used against him," the defendant was denied due process.).

Each of the defendants in *Gardner*, *Skipper*, and *Simmons* were barred from presenting to the jury evidence of

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[5] The *Simmons* Court also cited *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986) (noting that due process entitles a defendant to "a meaningful opportunity to present a complete defense"), and *Ake v. Oklahoma*, 470 U.S. 68, 83-87, 105 S.Ct. 1087, 1096-98, 84 L.Ed.2d 53 (1985) (holding that due process entitles an indigent defendant to the assistance of a psychiatrist for the development of his defense). *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2194 (plurality opinion).

critical importance to the fact-finding process. The similarity between the situation that confronted Skipper and Simmons is especially striking. Surely a Constitution that entitles a defendant to rebut the prosecution's argument of future dangerousness with evidence of his good behavior in prison likewise entitles him to inform the jury that he will remain incarcerated for life. *Cf. id.* at 5 n. 1, 106 S.Ct. at 1671 n. 1. Thus, it would have been an illogical application of *Skipper* "to [have] decide[d] that it did not extend to the facts of" *Simmons*. *See Butler v. McKellar*, 494 U.S. 407, 415, 110 S.Ct. 1212, 1217, 108 L.Ed.2d 347 (1990).

In *Turner v. Williams*, we noted the "critical distinction between the *extension* of an existing rule on collateral review and the mere *application* of an existing normative rule . . . to a new set of facts." 35 F.3d at 884. Similarly, we noted in *Correll v. Thompson*, 63 F.3d 1279 (4th Cir.1995), that *Teague* was not an obstacle where "[t]he question presented to us merely requires the application of [prior] decisions to a new set of facts – not an extension of precedent to create a new rule." *Id.* at 1285 n. 5. The normative formulation from which *Simmons* sprang was enunciated in *Gardner* and, even more clearly, in *Skipper*. It need not previously have been applied in a factually identical situation in order to avoid classification as a "new rule." *See Stringer v. Black*, 503 U.S. 222, 227-29, 112 S.Ct. 1130, 1134-36, 117 L.Ed.2d 367 (1992). For "when we apply an extant normative rule to a new set of facts (leaving intact the extant rule) generally we do not announce a new constitutional rule of criminal procedure for purposes of *Teague*." *Id.* at 885; *see also id.* (" 'If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the

force with which the precedent's underlying principle applies, the distinction is not meaningful and any deviation from precedent is not reasonable.' ") (quoting *Wright v. West*, 505 U.S. 277, 304, 112 S.Ct. 2482, 2497, 120 L.Ed.2d 225 (1992) (O'Connor, J., concurring in the judgment)).

The *Simmons* plurality reached the conclusion that its decision was "*compel[led]*" by *Gardner* and *Skipper*, cases handed down years before O'Dell's conviction became final. *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2194 (plurality opinion).[6] The Supreme Court has recognized, however,

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[6] Nothing in Justice O'Connor's opinion concurring in the judgment contradicts the plurality's conclusion that "it is *clear* that the State denied petitioner due process." *Simmons*, 512 U.S. at ___, 114 S.Ct. at 2193 (plurality opinion) (emphasis added). The Commonwealth would have me read the plurality and concurring opinions to disagree over the plurality's conclusion that *Simmons* was compelled by existing precedent. I see the divergence differently. Unlike the Justices concurring in the judgment, the plurality would recognize a constitutional violation even where the defendant did not seek to rebut evidence that he would pose a danger in the future. *Compare id.* at ___, 114 S.Ct. at 2190 (plurality opinion) ("due process requires that the sentencing jury be informed that the defendant is parole ineligible") *with id.* at ___, 114 S.Ct. at 2201 (O'Conner, J., concurring in the judgment) ("due process entitles the defendant to inform the capital sentencing jury – by either argument or instruction – that he is parole ineligible"). Because the issue is not before me, I do not address whether the plurality's position would constitute a new rule under *Teague*. Because this case falls within the most narrow reading of *Simmons*, that provided by Justice O'Connor's concurrence, O'Dell neither seeks nor requires the application of a broader mandate.

that a court's indication that a case is "directly controlled" by earlier authority is not dispositive of the new rule issue. *See Butler*, 494 U.S. at 414, 110 S.Ct. at 1217. Although such language is not conclusive, see *id.* at 415, 110 S.Ct. at 1217, it is a factor in assessing whether an objectively reasonable jurist would have predicted a particular decision.

Similarly, that a judgment garners support from a substantial majority of the Court's Justices provides an indication that a decision reasonably was expected. In the case before me, seven Justices accepted Simmons' argument that his due process rights had been violated because he was not allowed to present evidence rebutting the state's future dangerousness argument. I also note that a substantial majority of states had rejected the practice disapproved of in *Simmons*. At the time of that decision, "only two states other than South Carolina [had] a life-without-parole sentencing alternative to capital punishment for some or all convicted murderers but refuse[d] to inform sentencing juries of this fact." *Simmons*, 512 U.S. at ___ n. 8, 114 S.Ct. at 2196 n. 8.

In arguing that *Simmons* announced a new rule, the Commonwealth and the majority rely heavily on *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). In that case, the Court upheld as consistent with due process a California sentencing provision that permitted the trial court to advise the jury of the Governor's power to commute a life sentence, but not requiring it to inform the jury of his power to commute a death sentence. According to the *Ramos* Court, the instruction "d[id] not violate any of the substantive limitations this

Court's precedents have imposed on the capital sentencing process." *Id.* at 1013, 103 S.Ct. at 3459-60. As Justice Blackmun noted in *Simmons*, however, *Ramos* is not inconsistent with the *Gardner/Skipper* rule applied in *Simmons*.[7] *Id.* at ___, 114 S.Ct. at 2196. The *Ramos* Court explicitly upheld the California statute because it did "not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence." 463 U.S. at 1004, 103 S.Ct. at 3455. Moreover,

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[7] According to Justice Blackmun:

> It is true that *Ramos* stands for the broad proposition that we generally will defer to a State's determination as to what a jury should and should not be told about sentencing. . . . States reasonably may conclude that truthful information regarding the availability of commutation, pardon, and the like, should be kept from the jury in order to provide "greater protection in [the States'] criminal justice system than the Federal Constitution requires." Concomitantly, nothing in the Constitution prohibits the prosecution from arguing any truthful information relating to parole or other forms of early release.
>
> But if the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole ineligibility allows the defendant to "deny or explain" the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.

Simmons, 512 U.S. at ___, 114 S.Ct. at 2196 (plurality opinion) (citation omitted).

Ramos "emphasized that informing the jury of the Governor's power to commute a sentence of life without possibility of parole was merely an accurate statement of a potential sentencing alternative." *Ramos*, 463 at 1009, 103 S.Ct. at 3457. In contrast, the *Simmons* problem occurs where a defendant is prohibited from presenting information necessary to correct a critical misapprehension created by the prosecution,[8] and *Gardner* and *Skipper* demonstrate that a capital defendant *must* be afforded the opportunity to rebut evidence offered by the prosecution regarding his future dangerousness.[9]

I recognize that some courts, including this one, had interpreted the language in *Ramos* broadly and reached what at first glance appears to be a result contrary to *Simmons*. Most of those decisions, however, actually did not involve a true *Simmons* situation: a capital defendant seeking to rebut the prosecution's contention of future

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[8] In recognizing the analytical distinctions between these lines of authority, it should be remembered that *Ramos* falls chronologically between *Skipper* and *Gardner*. The *Ramos* Court found no need to overrule or limit *Gardner*. Likewise, the *Skipper* Court did not find it necessary to distance itself from *Ramos* to hold that a capital defendant is entitled to rebut evidence of future dangerousness.

[9] Assessing how a reasonable jurist might have analyzed any perceived conflict between *Ramos* and *Skipper*, it is much easier to distinguish the commutation power at issue in *Ramos* than the evidence of a capital defendant's good behavior at issue in *Skipper*. Compared with parole, commutation is a relatively minor power that is rarely invoked and less central to the question of future dangerousness. Most importantly, the impact of an instruction on the possibility of commutation in a capital jury's sentencing deliberation is unclear.

dangerousness with evidence of his statutory ineligibility for parole. Both *Turner v. Bass*, 753 F.2d 342 (4th Cir.1985), *rev'd on other grounds sub nom. Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), and *Peterson v. Murray*, 904 F.2d 882 (4th Cir.1990), on which the Commonwealth relies extensively, involved factually distinct circumstances.[10] As I have construed it above, *Simmons*

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[10] In *Turner v. Bass*, we determined that, "while it is constitutionally permissible to instruct the jury on the subject of parole, such an instruction is not constitutionally required." 753 F.2d at 354. However, the facts in *Turner v. Bass* are distinguishable from those in *Simmons* and this case. Turner clearly was eligible for parole, as he sought an instruction that "the parole board is permitted to grant parole only after finding that the prisoner's release will serve his interests and the interests of society." *Turner v. Bass*, 753 F.2d at 353. Importantly, *Skipper* – with its clear mandate that a defendant is entitled to rebut the prosecution's claim of future dangerousness – had yet to be decided.

In *Peterson*, the petitioner would have been ineligible for parole only for a period of twenty years. 904 F.2d at 882. Also, the *Peterson* panel rested its holding on the right to present mitigating evidence under the Eighth Amendment doctrine of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), not that entitling a defendant to rebut damaging evidence presented by the prosecution under the Fourteenth Amendment jurisprudence of *Gardner* and *Skipper*. *Peterson*, 904 F.2d at 887 (" '[S]tates are free to structure and shape consideration of mitigating evidence.' ") (quoting *Boyde v. California*, 494 U.S. 370, 377, 110 S.Ct. 1190, 1196, 108 L.Ed.2d 316 (1990)). In fact, the Peterson panel failed to distinguish *Gardner* and *Skipper* in any way, presumably because the cases were inapplicable to the claim before it. I note as well that *Peterson* had not been decided at the time O'Dell's conviction became final, and therefore could not have influenced a reasonable jurist in any event. Finally, the *Peterson* panel considered itself bound by our earlier decision in *Turner*, see *infra* note 8, which was decided without benefit of

applies only in this relatively narrow situation. Were the *Simmons* "rule" to be read broadly, it might indeed run afoul of *Ramos* and necessarily be considered "new." As even the Commonwealth recognized at oral argument, however, "[t]hey did not have to overrule *Ramos* to write the *Simmons* opinion."

Moreover, "the mere existence of [prior] conflicting authority does not necessarily mean a rule is new." *Wright*, 505 U.S. at 304, 112 S.Ct. at 2497 (O'Connor, J., concurring in the judgment). As we discussed extensively

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the intervening decision in *Skipper. Peterson*, 904 F.2d at 887 ("Our holding in *Turner* controls here.").

The other Court of Appeals case on which the Commonwealth relies, *O'Bryan v. Estelle*, 714 F.2d 365 (5th Cir.1983), is similarly distinguishable. There is no indication that the defendant in *O'Bryan* was ineligible for parole. He challenged the trial court's "refusal to instruct the jury about the law governing the Board of Pardons and Paroles in relation to inmates sentenced to life imprisonment," in order to correct the "widely held misconception that a life sentence will result in a defendant's only serving nine or ten years in prison." *Id.* at 388. Again, there is no sign that the petitioner sought to remedy a misimpression created by the prosecution's argument that he would be dangerous in the future. It is, in fact, consistent with *Ramos* that the Fifth Circuit would reject a petitioner's general complaint that a jury might misunderstand the meaning of a life sentence as not being cognizable under the Constitution.

The state law cases on which the Commonwealth relies are similarly distinguishable. *See, e.g., Jenkins v. Commonwealth*, 244 Va. 445, 423 S.E.2d 360, 369-70 (1992) (defendant eligible for parole after thirty years), *cert. denied*, 507 U.S. 1036, 113 S.Ct. 1862, 123 L.Ed.2d 483 (1993); *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815, 828 (Va.) (decided prior to *Skipper*, and no indication of parole ineligibility), *cert. denied*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 (1985).

in *Turner v. Williams*, 35 F.3d at 883-84, the Supreme Court held in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), that the petitioner's constitutional claim was not precluded by *Teague*, despite the Fifth Circuit's conclusion that its previous decisions rejecting similar claims barred consideration of Penry's. *See Turner v. Williams*, 35 F.3d at 884. Penry "did not seek a new rule because he simply sought the application (not the extension) of a preexisting rule of law in a new factual setting." *Id.*

Similarly, *Simmons* applied the rule announced in *Gardner* and reaffirmed in *Skipper* to a different, but related, factual situation: the particular evidence the defendant sought to introduce to rebut the prosecution's evidence of future dangerousness was his statutory ineligibility for parole. As Justice Blackmun explained, and the Commonwealth conceded by admitting that *Ramos* remained good law after *Simmons*, *Ramos* and its progeny are not inconsistent with *Simmons*. *See Simmons*, 512 U.S. at ___, 114 S.Ct. at 2196 (plurality opinion). At bottom, *Simmons* examines whether a person who is subjected to the death penalty on future dangerousness grounds is entitled to rebut that argument with highly relevant evidence, not the presentation of a parole eligibility scheme to a jury. *Cf. Hunt v. Nuth*, 57 F.3d 1327, 1334 (4th Cir.1995) (citing *Simmons* as standing for the proposition that "the *crucial significance* of parole ineligibility in a capital sentencing is its relationship to future dangerousness and the ultimate objective of incapacitating the offender from inflicting future harm on society" (emphasis added)). *Ramos*, on the other hand, involved the application of a more general rule concerning a state's

discretion to offer or withhold the details of its commutation and early release systems. Because *Ramos* does not conflict with the more specific principle employed in *Simmons*, see *supra*, the *Simmons* Court could apply *Skipper* and *Gardner* without announcing a new rule of constitutional criminal procedure, at least as to convictions that became final after those cases were decided.

Applying *Teague* "leaves something to be desired, for '[i]t is admittedly often difficult to determine when a case announces a new rule. . . . ' " *Turner v. Williams*, 35 F.3d at 879 (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070 (plurality opinion)). In this case, however, the Commonwealth is forced to argue that *Simmons* announced a new rule because it was not dictated by one line of authority (*Ramos* and its progeny), when another line of more relevant cases compelled its result. Because the legal landscape of 1988 mandated the decision reached by the Supreme Court in *Simmons*, I believe that O'Dell does not seek the application of a "new rule" of constitutional criminal procedure.[11]

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[11] Because of my conclusion that O'Dell's *Simmons* claim is not *Teague*-barred, I do not address his argument that *Simmons* fits within the *Teague* exception for " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *See Turner v. Williams*, 35 F.3d at 878 n. 5 (quoting *Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257, 1264, 108 L.Ed.2d 415 (1990)). However, it seems to me that a strong argument could be made that when a state undertakes to impose a death sentence solely on the ground that a capital defendant poses a further danger, "fundamental fairness and the accuracy of the criminal proceeding" demand that he not be precluded from showing that he was, by virtue of the law of that state, parole ineligible.

C.

Having determined that *Simmons* applies, I turn now to the Commonwealth's argument that any *Simmons* error was harmless. On habeas review, a constitutional violation must have had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 620, 113 S.Ct. 1710, 1712, 123 L.Ed.2d 353 (1993). Contrary to our earlier decision in *Smith v. Dixon*, 14 F.3d 956, 980 (4th Cir.1994) (en banc), *cert. denied*, ___ U.S. ___, 115 S.Ct. 129, 130 L.Ed.2d 72 (1995), the Supreme Court recently held a petitioner does not carry this burden. *O'Neal v. McAninch*, ___ U.S. ___, ___, 115 S.Ct. 992, 994, 130 L.Ed.2d 947 (1995). Moreover, the Court explained that in a close case, where "the conscientious judge [is] in grave doubt about the likely effect of an error on the jury's verdict," the habeas petitioner "must win." *Id.*

The Commonwealth makes three specific arguments as to why the *Simmons* error suffered by O'Dell was harmless. First, it contends that the district court failed to find that O'Dell was ineligible for parole. The Virginia Supreme Court found that O'Dell had been convicted of three felonies within the meaning of Virginia Code § 53.1-151(B1), making him ineligible for parole under state law. The fact that the federal district court failed to make a specific finding to that effect is immaterial. Furthermore, in light of the Commonwealth's concession that O'Dell's situation falls within *Simmons*, this argument is trivial.

Second, the Commonwealth argues that O'Dell actually informed the jury that he would remain imprisoned

for the remainder of his life. As support for this proposition, it cites a rambling answer by O'Dell to a question about his age:

> I am forty-five – will be 45 on September 20. It's just like having a life sentence to go back to prison. I got sixteen years. I do fifteen on a life sentence. Okay. If I went back to prison without this conviction, I am doing a life sentence. I am doing a life sentence. I am never going to get out. It don't make no difference. I am never going to get out.

Joint Appendix at 2433. *Simmons* does hold that a jury's information about parole eligibility need not come by way of a court's instruction; it can come from defense counsel instead. *See Simmons*, 512 U.S. at ___ - ___, 114 S.Ct. at 2200-01 (O'Connor, J., concurring in the judgment). More, however, is required for effective conveyance of the material than was allowed O'Dell in this case. The trial judge found as much when he denied the Commonwealth's motion to strike O'Dell's testimony on the grounds that it informed the jury about his parole ineligibility. *Joint Appendix* at 2433. O'Dell's remarks did not effectively convey the evidence most critical to rebutting future dangerousness – that he was ineligible for parole under state law.

The Commonwealth's third argument rests on its assertion that O'Dell's jury sentenced him to death on the basis of two aggravating factors, vileness as well as future dangerousness. Under *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), where one valid aggravating factor is sufficient to support a death sentence, that sentence need not be set aside simply because

the jury also found an invalid aggravating factor. *Id.* at 884, 103 S.Ct. at 2746; *accord Smith v. Procunier*, 769 F.2d 170, 173 (4th Cir.1985), *aff'd sub nom. Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). While the trial transcript indicates a finding by the jury that O'Dell's crime was "outrageously wanton, vile or inhuman," see *Joint Appendix* at 2506, the Virginia Supreme Court determined that "the jury did not base its verdict on the vileness predicate." *O'Dell*, 364 S.E.2d at 507; *see also Joint Appendix* at 337. On that basis, the state court declined to consider O'Dell's argument that the trial court's instruction on the vileness predicate was improper, affirming his death sentence on the basis of the finding of "future dangerousness" alone. *O'Dell*, 364 S.E.2d at 510. Rejecting the Virginia court's finding at this time would effectively deprive O'Dell of his right to direct appeal. Moreover, as the Commonwealth admitted at oral argument, "[it] didn't move to correct" the allegedly erroneous finding, presumably because any error worked to its benefit. Recalling that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions," *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991), I accept the finding that O'Dell was convicted based on the future dangerousness factor only. Given the centrality of parole ineligibility to that issue, the Commonwealth has not met its burden to prove that the *Simmons* violation suffered by O'Dell had no "substantial and injurious effect or influence in determining the jury's

verdict." *O'Neal*, ___ U.S. at ___, 115 S.Ct. at 994. Therefore, the decision of the district court to vacate the sentence of death imposed on O'Dell was legally correct and should be affirmed.

II.

For these reasons, I am convinced that the district court's decision was correct and should be affirmed in its entirety. To the extent that the majority opinion fails to do this, I am compelled to dissent therefrom.

I am authorized to state that Judges HALL, MURNAGHAN, HAMILTON, MICHAEL and MOTZ join in this concurring and dissenting opinion.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 8, 1996

No. 94-4013
CA-92-480-R

JOSEPH ROGER O'DELL, III

Petitioner - Appellee

v.

J. D. NETHERLAND, Warden, Mecklenburg Correctional Center; RONALD J. ANGELONE, Director, Virginia Department of Corrections; JAMES S. GILMORE, III, Attorney General of the Commonwealth of Virginia; COMMONWEALTH OF VIRGINIA

Respondents - Appellants

No. 94-4014
CA-92-480-R

JOSEPH ROGER O'DELL, III

Petitioner - Appellant

v.

J. D. NETHERLAND, Warden, Mecklenburg Correctional Center; RONALD J. ANGELONE, Director, Virginia Department of Corrections; JAMES S. GILMORE, III, Attorney General of the Commonwealth of Virginia; COMMONWEALTH OF VIRGINIA

Respondents - Appellees

ORDER

Appellee/cross-appellant has filed a motion to stay the mandate, appellants filed a response in opposition and appellee filed a reply in support.

The Court grants the motion and stays issuance of the mandate for thirty days pursuant to Federal Rule of Appellate Procedure 41(b). The mandate will be stayed until November 7, 1996.

Judges Widener, Hall, Murnaghan, Ervin, Hamilton, Michael and Motz voted to grant the stay for thirty days and Chief Judge Wilkinson and Judges Russell, Wilkins, Niemeyer, Luttig and Williams voted to deny the motion.

Entered at the direction of Judge Luttig for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA,

v. Case No. 11,413

JOSEPH ROGER O'DELL,

Defendant.

ORDER

Pursuant to Section 53.1-232.1 of the Code of Virginia, having determined that the United States Court of Appeals has denied federal habeas corpus relief to the defendant, this Court hereby ORDERS that the death sentence of Joseph Roger O'Dell be carried out on the 18th day of December, 1996, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before December 3, 1996, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Ronald J. Angelone, Director
Virginia Department of Corrections
P.O. Box 26963
6900 Atmore Drive
Richmond, Virginia 23261

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Eugene Murphy
Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Entered this 24 day of Oct., 1996.

/s/ Illegible
Judge

I ask for this:

Pursuant to telephone conference
(10-24-96) With Albert D. Alberi, Deputy

_____
Robert Humphreys
Commonwealth's Attorney

Seen and objected to:

Pursuant to telephone conference
(10-24-96) with Robert S. Smith, Esquire

_____
Counsel for Defendant

SUPREME COURT OF THE UNITED STATES

No. 96-6867(A-424)

JOSEPH ROGER O'DELL, PETITIONER *v.*
J. D. NETHERLAND, WARDEN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(December 19, 1996)

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Questions 1 and 2 presented by the petition.

The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, January 30, 1997. Briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, February 27, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel or or before 3 p.m., Wednesday, March 12, 1997. Rule 29.2 does not apply.

JUSTICE SCALIA, statement respecting the grant of certiorari.

My vote was to deny the petition for certiorari in this case (and hence to deny the application for stay of execution), but I think it important to point out that the issue on which certiorari has been granted, and for which stay has been accorded, has nothing to do with O'Dell's claimed innocence of his crime. The Court has expressly

limited its grant of review to Questions 1 and 2 of the petition for certiorari, which present the legal issue of whether our decision in *Simmons v. South Carolina*, 512 U. S. 154 (1994) – holding that a capital sentencing jury must in certain circumstances be instructed on the possibility of life imprisonment without parole as an alternative to a death sentence – has retroactive application to persons tried before *Simmons* was decided.

We have not granted certiorari on Question 3, the actual-innocence claim based upon newly available DNA evidence. That claim has been rejected by every one of the 13 Court of Appeals judges who have heard this case, as well as by the District Court that originally considered the claim. *O'Dell v. Netherland*, 95 F. 3d 1214, 1246-1254 (CA4 1996) (en banc); *id.*, at 1255-1256 (ERVIN, J., concurring in part and dissenting in part); *id.*, at 1218 (describing District Court decision). The unanimity of these 14 federal judges is unsurprising when the full story of the DNA evidence is told. While the DNA tests showed that blood stains on O'Dell's shirt did not come from the murder victim, Helen Schartner, they also showed that blood stains on his jacket *did* come from the victim – a conclusion consistent with the overwhelming evidence at trial that blood stains on numerous pieces of O'Dell's clothing came from her. *Id.*, at 1247-1248. Not one of the judges reviewing this evidence has been persuaded of O'Dell's innocence.

(8)

No. 96-6867

FILED

JAN 30 1997

CLERK

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

J.D. NETHERLAND, Warden, Mecklenburg Correctional Center; RONALD J. ANGELONE, Director, Virginia Department of Corrections; JAMES S. GILMORE, III, Attorney General of the Commonwealth of Virginia; COMMONWEALTH OF VIRGINIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF PETITIONER

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45 pp

QUESTIONS PRESENTED

1. Did this Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994) – which recognized that when a prosecutor seeks to establish future dangerousness before a capital sentencing jury, due process entitles the defendant to rebut by presenting information regarding his parole ineligibility – announce a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), which cannot be applied to final state-court convictions?

2. If *Simmons* announced a "new rule," does it fall within the second exception to *Teague*, which allows for the retroactive application of procedural rules that protect the fundamental fairness and accuracy of criminal proceedings?

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OPINIONS BELOW

The majority and dissenting opinions of the *en banc* court of appeals are reported at 95 F.3d 1214 and 1255. (J.A. 222 and 321.) There is no panel decision of the court of appeals. The opinion of the district court is not officially reported. (J.A. 138.)

JURISDICTION

On September 10, 1996, the court of appeals entered judgment reversing the order of the district court to the extent it granted habeas relief, and affirming it to the extent it denied habeas relief. 95 F.3d 1214. (J.A. 222.) Petitioner filed a timely petition for certiorari, which this Court granted on December 19, 1996. 117 S. Ct. 631. (J.A. 345.) This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the Fourteenth Amendment to the United States Constitution. It also involves Va. Code Ann. § 53.1-151(B1). (Pet. Appendix 181a-86a.)

STATEMENT OF THE CASE

A. Trial Court Proceedings

Joseph O'Dell was convicted of capital murder in the death of Helen Schartner. During the penalty phase of

O'Dell's trial, the prosecution sought to establish O'Dell's future dangerousness. It asked the jury to impose a sentence of death on the ground that mere imprisonment was ineffective to curb O'Dell's criminal behavior, and nothing short of death would prevent O'Dell from committing future crimes. The prosecution highlighted O'Dell's past releases on parole, made repeated references to the fact that O'Dell was under the supervision of a Virginia parole officer at the time of Helen Schartner's death, and gave the jury the impression that, if O'Dell were sentenced to life imprisonment rather than death, he might again be paroled and commit other offenses. In the prosecution's brief cross-examination of O'Dell, the words "parole" and "release" were used seventeen times.[1] Thereafter, the prosecutor made the following remarks in a closing argument:

> Isn't it interesting that he is only able to be *outside of the prison system* for a matter of months to a year and a half before something has happened again?

(J.A. 61) (italics added).

> [Y]ou may still sentence him to life in prison, but I ask you ladies and gentlemen in a system, in a society that believes in its criminal justice system and its government, *what does this mean*?
>
> . . . .

---

[1] The cross-examination of O'Dell appears on pages 139-54 of the September 11, 1986, trial transcript and is reprinted in full on pages 2437-52 of Volume 5 of the Joint Appendix submitted to the court of appeals below.

> I put it to you ladies and gentlemen. What is right in this case is that this man has forfeited his right to live among us because all the times he has committed crimes before and been before other juries and judges, no sentence ever meted out to this man has stopped him. *Nothing has stopped him, and nothing ever will except the punishment that I now ask you to impose.*

(J.A. 66) (italics added).

Contrary to the suggestions of the prosecution, however, if O'Dell had been sentenced to life imprisonment rather than death, he would never have been "outside of the prison system." He would have been absolutely ineligible for parole in Virginia. Va. Code Ann. § 53.1-151(B1). O'Dell, who represented himself at trial, requested that the court instruct the jury that he would be ineligible for parole. (J.A. 3, 36-37.) The trial court denied O'Dell's request. (J.A. 42-43.) O'Dell also sought to testify in direct examination that he would be ineligible for parole. (J.A. 53-54.) The trial court excluded this testimony. (J.A. 54.)

As the prosecution requested, the jury specifically found that there was "a probability that [O'Dell] would commit criminal acts of violence that would constitute a continuing serious threat to society . . . " (J.A. 69), which is a statutory aggravating factor in Virginia, Va. Code Ann. § 19.2-264.2(1), and the jury fixed the sentence at death.[2]

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[2] As a second aggravating factor, the jury found that the crime was "outrageously wanton, vile or inhuman." (J.A. 69.) On direct appeal, however, the Virginia Supreme Court determined that "the jury did not base its verdict on the vileness

In short, O'Dell's sentencing proceeding was indistinguishable from the one in *Simmons v. South Carolina*, 512 U.S. 154 (1994), where this Court held that a defendant who is not eligible for parole has a due process right to rebut a claim of "future dangerousness" by making his parole ineligibility known to the sentencing jury. O'Dell's case is one of those cited in *Simmons* as being contrary to the result *Simmons* reached. *Id.* at 168 n.8. Indeed, this case is a more egregious case than *Simmons* was, because of the prosecution's outrageous exploitation of the phantom possibility of "parole."

B. Direct Appeal and State Habeas Proceedings

On direct appeal, O'Dell argued, among other things, that the trial court's refusal to permit him to rebut the prosecution's claim of future dangerousness by informing the jury that the alternative to death was life without parole violated the " 'elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." ' *Skipper* [v. *South Carolina*, 476 U.S. 1, 5] n.1 [(1986)], *quoting Gardner v. Florida*, 430 U.S. 349, 362 (1977)." Appellant's Brief in Chief, *O'Dell v. Commonwealth*, at 73. The Virginia Supreme Court rejected this argument and affirmed O'Dell's conviction and sentence in all respects. 234 Va. 672, 364 S.E.2d 491 (1988). (J.A. 73.) On October 3, 1988, this Court denied review, 488 U.S. 871, thereby making O'Dell's conviction final. This date is

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predicate," 364 S.E.2d at 507 (J.A. 108), and it therefore refused to consider O'Dell's claim challenging the trial court's instruction on the vileness factor, *id.*

prior to the decision in *Simmons*, but subsequent to the decisions in *Gardner* and *Skipper*.

O'Dell unsuccessfully sought habeas relief from the Virginia state courts. (J.A. 118-31.) This Court declined to review the denial of state habeas relief. *O'Dell v. Thompson*, 502 U.S. 995 (1991). (J.A. 132.) Justice Blackmun wrote a separate concurrence for himself, Justice Stevens and Justice O'Connor "to underscore the importance of affording petitioner meaningful federal habeas review." *Id.* at 995, 996-97 n.3. (J.A. 132, 134-35.)

C. Federal Habeas Proceedings

1. The District Court Decision

After exhausting his state-court remedies, O'Dell sought federal habeas relief. His petition, filed before *Simmons* was decided, alleged that "when, as here, the *prosecution* seeks to mislead the jury as to sentencing [, a]ccuracy demands that a defendant be permitted to rebut, deny and explain information offered by the prosecution," Petition for a Writ of Habeas Corpus (No. CL89-1475), at 108, ¶ 258 (citing *California v. Ramos*, 463 U.S. 992, 1009 n.23 (1983), and *Gardner*); that "denying O'Dell his right to rebut this false implication ['that O'Dell would be released if given life imprisonment'] was also a blatantly unconstitutional denial of his right to due process," *id.* at 109, ¶ 261; and that "in light of Virginia's inclusion of a defendant's future dangerousness as an aggravating factor . . . , fundamental fairness unquestionably required that O'Dell have the opportunity to rebut inaccurate information offered by the prosecution

as evidence of that aggravating factor," *id.* at 110, ¶ 262.[3] *Simmons* was decided on June 17, 1994, while the federal habeas petition was pending.

In an Order and Memorandum Opinion dated September 6, 1994, the United States District Court for the Eastern District of Virginia applied *Simmons*, holding that the trial court's refusal to allow O'Dell to rebut the prosecution's contention of future dangerousness by informing the sentencing jury of his parole ineligibility deprived O'Dell of due process and subjected him to cruel and unusual punishment under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. (J.A. 220.)

The district court held that this Court's decision in *Simmons* was compelled by its previous decisions in *Gardner* and *Skipper*, that it therefore did not announce a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), and that it could be applied to O'Dell's final conviction. (J.A. 199-201.) The district court further held that the constitutional error had a "substantial and injurious effect or influence" on the jury's decision to impose a death sentence. (J.A. 201-02, 220, quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).) Accordingly, the district court granted the writ of habeas corpus and remanded the case to state court for a new sentencing proceeding. (J.A. 221.)

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[3] The Petition for a Writ of Habeas Corpus is reproduced in full on pages 27-176 of Volume 1 of the Joint Appendix submitted to the court of appeals below.

2. The Court of Appeals Decision

The Commonwealth appealed from the district court's order to the extent it granted habeas relief on the *Simmons* claim, and O'Dell cross-appealed to the extent it denied habeas relief on his other claims. The appeals were argued before a three-judge panel of the United States Court of Appeals for the Fourth Circuit. Prior to the issuance of any panel decision, the court of appeals ordered reargument before the full court *en banc*.

In a decision dated September 10, 1996, the *en banc* court of appeals reversed the district court's order to the extent it invalidated O'Dell's death sentence, and affirmed it to the extent it denied habeas relief. 95 F.3d at 1218. (J.A. 224.) Although no judge questioned that O'Dell's sentencing proceeding ran afoul of *Simmons*, the court held, by a vote of 7-6, that *Simmons* announced a "new rule" that could not be retroactively applied to O'Dell's sentence. *Id.*

The court of appeals majority acknowledged that a plurality of this Court expressly stated in *Simmons* that the result there was "compel[led]" by the Court's previous decisions in *Gardner* and *Skipper*, which were issued prior to O'Dell's conviction becoming final in 1988. 95 F.3d at 1235 (quoting *Simmons*, 512 U.S. at 165 (plurality opinion)). (J.A. 267-68.) Indeed, the majority conceded that,

> [w]ere *Gardner* and *Skipper* the totality of the "legal landscape" in 1988, the claim that *Simmons* was not a new rule might, at least at first blush, have considerable force.

95 F.3d at 1225. (J.A. 241.)

Nevertheless, the court of appeals majority concluded that *Simmons* represents "the paradigmatic 'new rule.' " 95 F.3d at 1218. (J.A. 224.) To reach this conclusion, the majority relied principally on this Court's previous decision in *California v. Ramos*, 463 U.S. 992 (1983), which was decided after *Gardner*, but before *Skipper*. The majority asserted that, in *Ramos*, "every Member of the Supreme Court apparently approved, as constitutionally permissible, the very practice later held unconstitutional in *Simmons*," and that, in light of *Ramos*, a reasonable jurist would have thought it "all but a certainty that the rule of *Simmons* was not only not compelled, but forbidden." 95 F.3d at 1218, 1231-32. (J.A. 224, 258.)

According to the court of appeals majority, a reasonable jurist in 1988 would have been obliged to "reconcile" what the majority perceived as a "tension" between *Gardner* and *Skipper*, on the one hand, and *Ramos*, on the other hand. 95 F.3d 8 at 1232, 1234. (J.A. 259, 265.)[4] This "tension," the majority believed, could have been "reconcile[d]" by an "entirely reasonable" distinction between "fact" and "law":

[4] In support of its conclusion, the court of appeals majority also relied on this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), in which this Court held it unconstitutionally misleading for the prosecution to inform jurors that, due to the possibility of appellate review, they were not finally responsible for a death sentence. *Id.* at 335. The majority believed that *Caldwell*, like *Ramos*, stood in "tension" with the result later reached in *Simmons*, 95 F.3d at 1230-34 (J.A. 253-66), despite the fact that neither the plurality, concurring nor dissenting opinion in *Simmons* makes any reference to *Caldwell*.

> That is, a reasonable jurist could have concluded that the due process principle of *Gardner* and *Skipper* was that a trial court could not deny a capital defendant the opportunity to rebut arguments made by the State with relevant *factual evidence* about himself, his character, and his particular offense. . . .
>
> In contrast, that 1988 jurist could have and, indeed, would have most reasonably understood *Ramos* . . . as setting forth the principle that whether to instruct juries on state law . . . is a decision left to the "wisdom of . . . the States" by the Constitution.

95 F.3d at 1232-33 (quoting *Ramos*, 463 U.S. at 1014). (J.A. 260-62.) The Commonwealth never suggested this "fact/law" distinction in the proceedings below, and the majority cited no occasion on which any jurist ever actually entertained it.

Because, in the majority's view, a reasonable jurist in 1988 might not have thought that *Gardner* and *Skipper* compelled the result in *Simmons*, it concluded that *Simmons* announced a "new rule" within the meaning of *Teague*. 95 F.3d at 1237-38. (J.A. 276.) In addition, the majority held, the rule of *Simmons* does not fall within the second of two established exceptions to *Teague*, which allows for the retroactive application of procedural rules affecting the fundamental fairness and accuracy of criminal proceedings. 95 F.3d at 1239. (J.A. 276-78.)[5] The court

[5] The court of appeals majority stated in a footnote that "there are strong indications that even if [the failure to give the *Simmons* instruction] had been error, it would have been harmless," but it declined to rest its decision on this ground. 95 F.3d at 1239 n.14. (J.A. 278.)

of appeals unanimously rejected O'Dell's other claims. 95 F.3d at 1239-55. (J.A. 279-320.)

Six judges dissented from the majority's holding that *Simmons* announced a "new rule." 95 F.3d at 1256. (J.A. 321.) The dissenters believed that *Simmons* was logically compelled by *Gardner* and *Skipper*, noting that "[t]he similarity between the situation that confronted Skipper and Simmons is especially striking." 95 F.3d at 1258. (J.A. 328.) The dissent noted the *Simmons* plurality's statement that the prior cases "compel[led]" the *Simmons* decision; the "substantial majority" (7-2) by which *Simmons* was decided; and the fact that most states had, before *Simmons*, already rejected the practice which *Simmons* condemned. *Id.* at 1258-59. (J.A. 328-30.)

The dissent rejected the view that *Ramos* supported a result contrary to the one in *Simmons*. The dissenting judges noted that *Ramos* did not imply any limitation on a defendant's right to rebut a prosecutor's contentions; on the contrary, the *Ramos* Court upheld the statute before it expressly because the statute did not interfere with that right. *Id.* at 1259. (J.A. 331.)

Moreover, although the dissenters found no need to reach the question, they also stated their belief that, even if *Simmons* did announce a "new rule," a "strong argument" could be made that it falls within the second exception to *Teague*. 95 F.3d at 1261 n.11. (J.A. 336.) Finally, the dissenters agreed with the district court that the *Simmons* violation here had a "substantial and injurious effect or influence in determining the jury's verdict." 95 F.3d at 1261-62 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). (J.A. 337-40.)

On November 26, 1996, O'Dell filed a timely petition for certiorari. On December 19, 1996, this Court granted a writ of certiorari, limited to the issues of whether *Simmons* announced a new rule, and whether it falls within the second exception to *Teague*. 117 S. Ct. 631. (J.A. 345.)

SUMMARY OF THE ARGUMENT

1. Simmons *Did Not Announce a "New Rule."* A decision of this Court does not announce a "new rule," and may be applied to a final state-court conviction, if, at the time the conviction became final, a "reasonable jurist" would have thought that it was compelled by existing precedent. In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the plurality opinion expressly stated that "[t]he principle announced in *Gardner* [and] reaffirmed in *Skipper . . . compels* our decision today." *Id.* at 165 (plurality opinion) (italics added). The concurrence in *Simmons*, although not actually using the verb "compel," also indicated that *Simmons* was not announcing a "new rule."

The *Simmons* plurality was correct in asserting that *Gardner v. Florida*, 430 U.S. 349 (1977), and *Skipper v. South Carolina*, 476 U.S. 1 (1986), both decided before O'Dell's conviction became final in 1988, "compel[led]" the result in *Simmons*. In *Gardner*, this Court ruled that the Due Process Clause does not permit the execution of a person "on the basis of information which he had no opportunity to deny or explain." *Gardner*, 430 U.S. at 362 (plurality opinion). In *Skipper*, the Court explained that "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty,"

"elemental due process require[s]" the admission of the defendant's relevant evidence in rebuttal. *Skipper*, 476 U.S. at 5 n.1 (citing *Gardner*, 430 U.S. at 362). The precise issue in *Skipper* – whether a defendant could introduce evidence of his good conduct in prison to rebut an allegation of future dangerousness – was close to, and in principle indistinguishable from, the issue later presented in *Simmons*.

A reasonable jurist in 1988 would not have thought that *California v. Ramos*, 463 U.S. 992 (1983), protected the practice later rejected in *Simmons*. *Ramos*, unlike *Skipper*, is obviously distinguishable from *Simmons*. As the *Ramos* Court itself pointed out, *Ramos* did not involve the "right to rebut" established by *Gardner* (and later applied in *Skipper*). Moreover, *Ramos* expressly recognized that a State's general discretion to determine what a jury may be told about sentencing is *limited* by *Gardner*'s due process right of rebuttal. The "fact/law" distinction suggested by the court of appeals majority as a basis for holding that *Ramos*, rather than *Gardner* and *Skipper*, controlled the *Simmons* situation is lacking in merit and was never advanced by any jurist prior to the court of appeals' ruling in this case.

No reasoned decision rendered after *Skipper* approved of the practice, condemned in *Simmons*, of barring a defendant from rebutting a charge of future dangerousness by advising the jury of his parole ineligibility. This confirms that the rule of *Simmons* was not new. Indeed, all federal courts that have considered the issue, except the court of appeals below, have held that *Simmons* did not announce a new rule.

2. Simmons *Falls Within the Second Exception to* Teague. The second exception to *Teague* allows for the retroactive application of "bedrock" procedural protections that implicate "the fundamental fairness and accuracy of the criminal proceeding." The practice condemned in *Simmons* was fundamentally unfair and an invitation to inaccurate jury determinations.

To ask a jury to assess a defendant's "future dangerousness" while withholding from the jury the truth as to whether the defendant will or will not be incarcerated for the rest of his life is a bizarre and indefensible procedure. It will inevitably result in the execution of people whom a correctly-informed jury would not have condemned to death. *Skipper* noted that "elemental due process require[s]" that a capital defendant be allowed to meet the case against him, *Skipper*, 476 U.S. at 5 n.1, and Justice O'Connor's concurrence in *Simmons* reiterated that this right is a "hallmark of due process," *Simmons*, 512 U.S. at 175. Those comments reflect the fundamental, "bedrock" nature of the right at issue in *Simmons* and here.

ARGUMENT

I.

SIMMONS DID NOT ANNOUNCE A NEW RULE FOR PURPOSES OF *TEAGUE*

A. *Gardner* and *Skipper* "Compel[led]" the Result in *Simmons*

A decision constitutes a "new rule" if it "breaks new ground or imposes a new obligation on the States." *Teague*

v. Lane, 489 U.S. 288, 301 (1989). By contrast, a rule is deemed not to be "new" if a reasonable jurist, in considering the petitioner's claim at the time the conviction became final, would have felt "*compelled* by existing precedent to conclude that the rule [the petitioner] seeks was required by the Constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (italics added).

The plurality opinion in *Simmons*, joined by four Members of this Court, expressly stated that "[t]he principle announced in *Gardner* was reaffirmed in *Skipper*, and it *compels* our decision today." *Simmons*, 512 U.S. at 165 (plurality opinion of Justice Blackmun, joined by Justices Stevens, Souter and Ginsburg) (italics added). The *Simmons* plurality also found that:

> [t]he trial court's refusal to apprise the jury of information crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, *cannot be reconciled with our well-established precedents* interpreting the Due Process Clause.

Id. at 164 (italics added).[6]

---

[6] Additional language in *Simmons* supports the conclusion that the result there was thought to be "compel[led]" by this Court's precedents. Thus, the plurality observed:

> An instruction directing the jury not to consider the defendant's likely conduct in prison would not have satisfied due process in *Skipper*, and, *for the same reasons*, the instruction issued by the trial court in this case does not satisfy due process.

Simmons, 512 U.S. at 171 (plurality opinion) (italics added; citation omitted). *See also id.* at 162 ("it is *clear* that the State

A concurring opinion in *Simmons*, joined by three other Members of this Court, although not actually using the verb "compel," indicated its agreement with the plurality on this point:

> "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, . . . the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain' [*requires* that the defendant be afforded an opportunity to introduce evidence on this point]."

Id. at 175 (opinion of Justice O'Connor, concurring in the judgment, joined by the Chief Justice and Justice Kennedy) (quoting *Skipper*, 476 U.S. at 5 n.1, and *Gardner*, 430 U.S. at 362) (bracketed material and ellipsis in original; italics added).[7]

---

denied petitioner due process") (italics added). Similarly, a separate concurrence in *Simmons* expressed the view that an "additional, related principle" announced in the Court's previous Eighth Amendment decisions "*also compels* today's decision." *Id.* at 172 (opinion of Justice Souter, joined by Justice Stevens, concurring) (italics added).

[7] The dissent in *Simmons* also cited *Gardner* and *Skipper* for the proposition that a defendant in a capital sentencing proceeding has a due process right to "deny or explain" adverse information. 512 U.S. at 180 (opinion of Justice Scalia, joined by Justice Thomas, dissenting). The dissent found that principle inapplicable on the facts of *Simmons*, noting that the prosecutor in *Simmons* "did not *invite* the jury to believe that petitioner would be eligible for parole – he did not *mislead* the jury." *Id.* at 182. In the present case, the prosecutor *did* blatantly mislead the jury, dwelling on O'Dell's prior releases on parole and specifically emphasizing O'Dell's dangerousness "outside of

The plurality's statements that the result in *Simmons* was compelled by *Gardner* and *Skipper*, with which the concurrence agreed in substance, were dismissed by the court of appeals majority as "hortatory *dicta*." 95 F.3d at 1235. (J.A. 268.) The majority relied on this Court's admonition that:

> the fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under *Teague*. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts.

Id. (quoting *Butler v. McKellar*, 494 U.S. 407, 415 (1990)).

The *Simmons* plurality, however, said more than that the result there was "within the 'logical compass,' " "controlled" or "governed" by this Court's precedents. It said that the result in *Simmons* was "compel[led]" by *Gardner* and *Skipper*. This is considerably more than "hortatory *dicta*." The conclusion is unavoidable that, at the time this Court considered the constitutional rule in *Simmons*, a majority of its Members believed that the pre-1988 precedents of *Gardner* and *Skipper* required its result. They were amply justified in that belief.

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the prison system." (*See* the excerpts from the prosecution's summation quoted *supra* pp. 2-3.) Thus, even on the analysis of the *Simmons* dissent, *Gardner* and *Skipper* would compel a result favorable to O'Dell in the present case.

In *Gardner*, the defendant was sentenced to death based in part on a pre-sentence report that was not made available to him, and therefore could not be rebutted. This Court ruled that the death sentence was invalid because the Due Process Clause does not permit the execution of a person "on the basis of information which he had no opportunity to deny or explain." *Gardner*, 430 U.S. at 362 (plurality opinion).

In *Skipper*, this Court applied this principle in a situation strikingly similar to the one presented in *Simmons*. In *Skipper*, the Court held that the defendant was denied due process by the refusal of the trial court in the capital sentencing phase to admit evidence of the defendant's good behavior in prison. The Court explained that "[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty," "elemental due process require[s]" the admission of the defendant's relevant evidence in rebuttal. *Skipper*, 476 U.S. at 5 n.1 (citing *Gardner*, 430 U.S. at 362); *accord id.* at 9 (opinion of Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concurring in the judgment).

In essence, *Simmons* presented a variation on the facts in *Skipper*. In *Simmons*, as in *Skipper*, the prosecution raised the issue of future dangerousness before the sentencing jury. In *Simmons*, the trial court refused to instruct the jury on the defendant's ineligibility for parole, and forbade defense counsel from presenting accurate information on the subject. Thus, while Skipper was denied the right to prove that he had behaved well in prison, and thereby suggest to the jury that he would not be dangerous if sentenced to life imprisonment, Simmons

sought to present to the jury the even more obviously relevant fact that he would actually be *in* prison, and not out on the street, for the rest of his life if sentenced to life imprisonment. As the dissent below said:

> The similarity between the situation that confronted Skipper and Simmons is especially striking. Surely a Constitution that entitles a defendant to rebut the prosecution's argument of future dangerousness with evidence of his good behavior in prison likewise entitles him to inform the jury that he will remain incarcerated for life. *Cf.* [*Skipper*, 476 U.S.] at 5 n.1. Thus, it would have been an illogical application of *Skipper* "to [have] decide[d] that it did not extend to the facts of" *Simmons*.

95 F.3d at 1258 (quoting *Butler v. McKellar*, 494 U.S. 407, 415 (1990)) (citations omitted; alterations in original). (J.A. 328.)

Indeed, even the court of appeals majority conceded that:

> Were *Gardner* and *Skipper* the totality of the "legal landscape" in 1988, the claim that *Simmons* was not a new rule might, at least at first blush, have considerable force.

95 F.3d at 1225. (J.A. 241.)

B. A Reasonable Jurist in 1988 Would Not Have Thought That *Ramos* Supported the Practice Condemned in *Simmons*

Despite the "considerable force" of the argument that *Gardner* and *Skipper* "compel[led]" the result in *Simmons*, the court of appeals majority nevertheless concluded that

Simmons represented "the paradigmatic 'new rule,' " 95 F.3d at 1218 (J.A. 224), based principally on this Court's decision in *Ramos*. However, at the time that O'Dell's conviction became final in 1988, a reasonable jurist would not have thought that *Ramos* permitted the practice rejected by *Simmons*.

1. Ramos *Does Not Support a Result Contrary to the* Simmons *Holding.*

In *Ramos*, this Court upheld a California sentencing provision that permitted the trial court to advise the jury of the Governor's power to commute a life sentence, but did not require it to inform the jury of the Governor's power to commute a death sentence. *Ramos*, 463 U.S. at 994. The mere recital of this holding shows that *Ramos* is distinguishable from *Simmons*. The possibility that the Governor will commute a sentence of death is simply not comparable, in its potential impact on a sentencing jury, to a statutory guarantee that the defendant will never be paroled.

It is easy to imagine a jury that will vote for a death sentence because it thinks parole is a possibility;[8] it is

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[8] Only two death sentences have been imposed in Virginia for crimes committed after January 1, 1995 – down from ten death sentences in 1994 alone – a decline that has been attributed to the fact that Virginia juries must now be informed of the life-without-parole rule. *See* Frank Green, *Death Sentences Decline in Virginia*, Richmond Times-Dispatch, Nov. 24, 1996. (Pet. Appendix II 279a.) *See also* Benjamin P. Cooper, Note, *Truth in Sentencing: The Prospective and Retroactive Application of* Simmons v. South Carolina, 63 U. Chi. L. Rev. 1573, 1573 n.2

difficult, at best, to imagine a jury that will vote for a death sentence only because it is unaware of the Governor's commutation power. Indeed, the *Ramos* Court found that the information withheld in *Ramos* would have no bearing on the sentencing determination, stating: "A jury concerned about preventing the defendant's potential return to society will not be any less inclined to vote for the death penalty upon learning that even a death sentence may not have such an effect." *Id.* at 1011. Because the information withheld from the jury in *Ramos* was irrelevant to the issue of future dangerousness, while the information withheld in *Simmons* was critical, *Ramos* could furnish no basis for upholding the practice that *Simmons* rejected.

But even if the large difference between the *Ramos* facts (involving the commutation power) and the *Simmons* facts (involving the defendant's ineligibility for parole) were ignored, *Ramos* does not support a result contrary to the *Simmons* holding – because *Ramos*, unlike *Gardner*, *Skipper* and *Simmons*, did not involve a capital defendant's due process right of rebuttal.

Both the plurality and the concurrence in *Simmons* expressly based their holding on the defendant's right to *rebut* the prosecution's assertion that he would be dangerous in the future. The plurality opinion in *Simmons* states:

(1996) (citing evidence that jurors who believe that a "life sentence" carries the possibility of parole are more likely to sentence a defendant to death).

> Like the defendants in *Skipper* and *Gardner*, petitioner was prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death. The State raised the specter of petitioner's future dangerousness generally, but then thwarted all efforts by petitioner to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in his view, would not pose a future danger to society.

Simmons, 512 U.S. at 165.

Similarly, the concurring opinion in *Simmons*, also relying on *Gardner* and *Skipper*, said it is a "hallmark of due process" that the defendant be entitled to "meet the State's case against him." *Id.* at 175 (O'Connor, J., concurring in the judgment). The concurrence concluded that:

> Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury – by either argument or instruction – that he is parole ineligible.

Id. at 178.

The right of rebuttal that *Simmons* upholds is not questioned in any way in the *Ramos* decision. Indeed, the *Ramos* Court expressly recognized that a State's general discretion to determine what a jury may be told about sentencing is *limited* by the due process right of rebuttal upheld in *Gardner*. The *Ramos* Court (writing before *Skipper* was decided) distinguished *Gardner* as follows:

> Nor is there any diminution in the reliability of the sentencing decision of the kind condemned in *Gardner v. Florida*, 430 U.S. 349 (1977). . . . Because of the potential that the sentencer [in *Gardner*] might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed. *Gardner provides no support for [the defendant here]*. The Briggs Instruction gives the jury *accurate* information of which both the defendant and his counsel are aware, and *it does not preclude the defendant* from offering any evidence or argument regarding the Governor's power to commute a life sentence.

Ramos, 463 U.S. at 1004. (italics added; footnote omitted).

Thus, the *Ramos* Court held that the jury instruction at issue in *Ramos* did not violate *Gardner* because, although it provided the jury with information that might be helpful to the state – *i.e.*, that a defendant sentenced to life imprisonment without parole might still be released back into society through the Governor's exercise of the commutation power – the defendant was allowed to introduce his own rebuttal information regarding the Governor's use of that power. The holding of *Simmons* is that a defendant may rebut evidence of future dangerousness by showing that he will *not* be released back into society. *Ramos* and *Simmons* are thus entirely consistent. Indeed, *Ramos* foreshadows *Simmons* in that the *Ramos* Court recognized that information regarding a defendant's likelihood of future release into society is "inextricably linked" to questions of future dangerousness. *Id.* at 1003 n.17.

The court of appeals majority thus erred in concluding that, in *Ramos*, "every Member of the Supreme Court apparently approved, as constitutionally permissible, the very practice later held unconstitutional in *Simmons*." 95 F.3d at 1218. (J.A. 224.) The majority also erred in stating that, in light of *Ramos*, a reasonable jurist in 1988 would have thought it "all but a certainty that the rule of *Simmons* was not only not compelled, but forbidden." 95 F.3d at 1231-32. (J.A. 258.)

As the dissent below correctly said:

> At bottom, *Simmons* examines whether a person who is subjected to the death penalty on future dangerousness grounds is entitled to rebut that argument with highly relevant evidence, not the presentation of a parole eligibility scheme to a jury. *Ramos*, on the other hand, involved the application of a more general rule concerning a state's discretion to offer or withhold the details of its commutation and early release systems. Because *Ramos* does not conflict with the more specific principle employed in *Simmons*, the *Simmons* Court could apply *Skipper* and *Gardner* without announcing a new rule of constitutional criminal procedure. . . .

95 F.3d at 1261 (citations omitted). (J.A. 335-36.)

2. *The "Fact/Law" Distinction Suggested by the Court of Appeals Majority Is Untenable.*

According to the court of appeals majority, a reasonable jurist "would have been obliged to reconcile" what the majority perceived as a "tension" between *Gardner* and *Skipper*, on the one hand, and *Ramos*, on the other

hand. 95 F.3d at 1232, 1234. (J.A. 259, 265.) The majority said that jurist could have found this "reconciliation" in an "entirely reasonable" "fact/law" distinction:

> That is, a reasonable jurist could have concluded that the due process principle of *Gardner* and *Skipper* was that a trial court could not deny a capital defendant the opportunity to rebut arguments made by the State with relevant *factual evidence* about himself, his character, and his particular offense. . . .
>
> In contrast, that 1988 jurist could have and, indeed, would have most reasonably understood *Ramos* . . . as setting forth the principle that whether to instruct juries on state law . . . is a decision left to the "wisdom of the . . . States" by the Constitution.

95 F.3d at 1232-33 (quoting *Ramos*, 463 U.S. at 1014). (J.A. 260-62.)

The members of the court of appeals majority are, so far as our research shows, the first jurists anywhere to perceive this supposed "tension" between *Gardner* and *Skipper*, on the one hand, and *Ramos*, on the other hand – let alone attempt to "reconcile" them on the basis of this "fact/law" distinction. The "fact/law" distinction was not urged by the Commonwealth below, and has never been suggested in any reported precedent.[9]

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[9] Asserting that the *Simmons* concurrence "recognized the very same distinction," 95 F.3d at 1234 (J.A. 266), the court of appeals majority pointed to the following passage:

> Unlike in *Skipper*, where the defendant sought to introduce *factual evidence* tending to disprove the State's showing of future dangerousness, [Simmons] sought to rely on the operation of *South Carolina's sentencing law* in arguing that he would not pose a threat to the community if he were sentenced to life imprisonment.

Simmons, 512 U.S. at 176 (O'Connor, J., concurring in the judgment) (quoted at 95 F.3d at 1233-34 (J.A. 264)) (italics added by the court of appeals majority; citation omitted). The immediately following language, however, demonstrates that the *Simmons* concurrence meant to draw no such distinction and, indeed, viewed the sentencing "law" as a "fact" in the *Simmons* context:

> In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that *fact*. . . . When the State seeks to show the defendant's future dangerousness, however, the *fact* that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case.

Id. at 176-77 (italics added).

And for good reason. Far from being "entirely reasonable," the "fact/law" distinction posited by the court of appeals majority is completely artificial and, as applied to this case, meaningless. What O'Dell, like Simmons, wanted the jury to know was essential *factual* information – that, in truth, if given a life sentence, he would spend the rest of his life in prison. The relationship of this fact to the Virginia parole statute does not justify concealing it from the jury. The reason suggested by the majority – that the state of the law can "change with time," while facts cannot, 95 F.3d at 1234 (J.A. 264) – is simply mistaken. Facts are no less subject to future change than law. For example, good behavior – the "fact" at issue in *Skipper* –

is at least as likely as the life-without-parole statute at issue here and in *Simmons* to "change with time."

Denying O'Dell a remedy for the violation of his due process rights thus cannot be justified by the "fact/law" distinction. "The purpose of the new rule doctrine is to validate reasonable interpretations of existing precedents" based on an "objective" standard. *Stringer v. Black*, 503 U.S. 222, 237 (1992). As a result:

> To determine what counts as a new rule, *Teague* requires courts to ask whether the rule a habeas petitioner seeks can be *meaningfully* distinguished from that established by binding precedent at the time his state court conviction became final. . . . If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful and any deviation from precedent is not reasonable.

Wright v. West, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring in the judgment) (italics added).

The majority's reading of *Ramos* is not reasonable, and the "fact/law" distinction the majority would draw from it is not meaningful. *See Stringer*, 503 U.S. at 233-36 (rejecting an unreasonable interpretation of *Lowenfield v. Phelps*, 484 U.S. 231 (1988), that would have been contrary to the later decision of *Clemons v. Mississippi*, 494 U.S. 738 (1990)). *Ramos* does not establish that *Simmons* announced a "new rule."

C. No Reasoned Decision After *Skipper* Approved of the Practice Condemned in *Simmons*

"[T]he mere existence of conflicting authority does not necessarily mean a rule is new." *Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring in the judgment). As this Court has explained:

> The purpose of the new rule doctrine is to validate reasonable interpretations of existing precedents. Reasonableness, in this as in many other contexts, is an objective standard, and the ultimate decision whether [a decision] was dictated by precedent is based upon an objective reading of the relevant cases.

Stringer, 503 U.S. at 237 (holding a rule not to be "new" even where a federal appellate court had previously rejected it). Nevertheless, it is significant that, contrary to the suggestion of the court of appeals majority, 95 F.3d at 1236-37 (J.A. 269-74), there is no *reasoned* decision of any state or federal court after *Skipper* that upholds as consistent with due process the specific practice that occurred in Simmons' and O'Dell's trials, *i.e.*, the refusal to allow a capital defendant to rebut the prosecution's contention of future dangerousness with evidence of his statutory ineligibility for parole.

As this Court noted in *Simmons*, only three states – Pennsylvania, South Carolina and Virginia – instructed sentencing juries to choose between death and life imprisonment, without disclosing the fact that, if given a life sentence, the defendant would never be eligible for

parole. *Simmons*, 512 U.S. at 168 n.8.[10] Subsequent to *Skipper*, however, neither the Pennsylvania nor the South Carolina courts upheld as constitutional the specific injustice worked upon O'Dell. The Pennsylvania Supreme Court condoned the practice of refusing to instruct the jury on the defendant's parole ineligibility only in cases where the prosecutor had not made future dangerousness an issue. *See Commonwealth v. Henry*, 569 A.2d 929 (Pa. 1990), *cert. denied*, 499 U.S. 931 (1991); *Commonwealth v. Strong*, 563 A.2d 479 (Pa. 1989), *cert. denied*, 494 U.S. 1060 (1990). Conversely, the South Carolina Supreme Court, in *Simmons*, upheld the practice of permitting a prosecutor to argue the future dangerousness of a defendant who would never be released on parole only after concluding that the jury had been effectively advised of the defendant's parole ineligibility. *See State v. Simmons*, 427 S.E.2d 175, 178-79 (S.C. 1993), *rev'd*, 512 U.S. 154 (1994).

After *Skipper*, only Virginia countenanced the due process violation condemned in *Simmons*. *See Mickens v. Commonwealth*, 442 S.E.2d 678, 685 (Va.), *vacated and remanded for further consideration in light of Simmons*, 115 S. Ct. 307 (1994); *Mueller v. Commonwealth*, 422 S.E.2d 380, 394 (Va. 1992), *cert. denied*, 507 U.S. 1043 (1993); *Eaton v.*

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[10] Two additional states – North Carolina and Texas – also did not disclose information concerning parole eligibility to sentencing juries. *See Simmons*, 512 U.S. at 179 n.2 (Scalia, J., dissenting). At the time *Simmons* was decided, however, there was no life without parole in these states. *See State v. Price*, 448 S.E.2d 827, 831 (N.C. 1994), *cert. denied*, 115 S. Ct. 1368 (1995); *State v. Robinson*, 451 S.E.2d 196, 206 (N.C. 1994), *cert. denied*, 115 S. Ct. 2565 (1995); *Smith v. State*, 898 S.W.2d 838, 850 (Tex. Crim. App.), *cert. denied*, 116 S. Ct. 131 (1995).

Commonwealth, 397 S.E.2d 385, 393 n.1 (Va. 1990), *cert. denied*, 502 U.S. 824 (1991); and the affirmance of O'Dell's conviction on direct appeal in this case, *O'Dell v. Commonwealth*, 364 S.E.2d 491, 507 (Va. 1988) (J.A. 108), *cert. denied*, 488 U.S. 871 (1988).[11] In these cases, the Virginia Supreme Court simply cited to its prior rulings in distinguishable cases, and did not even refer to this Court's decision in *Skipper*. Other than the decisions below, no federal court appears to have addressed the specific practice at issue here with respect to a conviction that became final after *Skipper*.[12] By contrast, the only post-*Skipper*, pre-*Simmons* court that gave real consideration to the issue presaged the holding of *Simmons* by holding that refusing to advise a capital sentencing jury of the defendant's parole ineligibility *does* violate due process. *See Turner v. State*, 573 So. 2d 657, 673-75 (Miss. 1990), *cert. denied*, 500 U.S. 910 (1991); *see also State v. Henderson*, 789 P.2d 603, 606-07 (N.M. 1990) (same where the defendant would be parole ineligible for thirty years).

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[11] The defendants in *Mueller* and *Eaton* have raised the retroactive application of *Simmons* in state and federal habeas proceedings, respectively.

[12] Several decisions from federal courts of appeals are distinguishable because they all involved defendants who could have become eligible for parole. *See Knox v. Collins*, 928 F.2d 657, 660 (5th Cir. 1991) (defendant eligible for parole after 20 years); *Peterson v. Murray*, 904 F.2d 882, 886-87 (4th Cir.) (same), *cert. denied*, 498 U.S. 992 (1990); *King v. Lynaugh*, 850 F.2d 1055, 1057-58 (5th Cir. 1988) (same), *cert. denied*, 488 U.S. 1019, *and cert. denied*, 489 U.S. 1093 (1989); *see also United States v. Chandler*, 996 F.2d 1073, 1086 (11th Cir. 1993) (holding that jury in federal capital prosecution need not be informed that life without parole is a "possibility"), *cert. denied*, 114 S. Ct. 2724 (1994).

It is small wonder that no reasoned decision after *Skipper* attempts to justify the practice that *Simmons* condemned – the practice of forcing a jury to decide the issue of future dangerousness in ignorance of the fact that the defendant is facing life without parole. The practice is impossible to justify. The *Simmons* plurality described its patent unfairness:

> [T]he jury may have reasonably believed that petitioner could have been released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration. This grievous misconception was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's parole ineligibility, and by the State's repeated suggestion that petitioner would pose a future danger to society if he was not executed. . . . The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole. We think it is clear that the State denied due process.

Simmons, 512 U.S. at 161-62 (plurality opinion).

Indeed, the prosecution here employed an even more egregious tactic than in *Simmons*. The Commonwealth dwelt on O'Dell's record of criminal behavior while on parole to create a false, yet irrebuttable, impression that only a death sentence could prevent his being paroled to

kill again. It then argued to the jury that "[n]othing has stopped" O'Dell – and nothing except the death penalty ever would. (*See supra* p. 3.) The unfairness of such a procedure is obvious, and there is no reasoned decision by any court anywhere that approves of it. There *never* was a time when any reasonable jurist would have thought it fair to condemn a person to death in such a manner.

D. All Other Federal Decisions That Have Addressed the Issue Hold That *Simmons* Did Not Announce a "New Rule"

Every federal court that has addressed the issue, except the court of appeals here, has agreed with the express view of the *Simmons* plurality that the result in *Simmons* was "compel[led]" by *Gardner* and *Skipper*. *See Spreitzer v. Peters*, 1996 WL 48585, at *5-*6 (N.D. Ill. Feb. 5, 1996) ("*Skipper* not only left little doubt that a capital defendant has the right to present his sentencer with any and all evidence that might mitigate his punishment, but was also very clear that testimony regarding a defendant's probable future conduct was such evidence. . . . This court is confident that had the Illinois courts carefully considered the constitutional dimensions of [petitioner's] due process claim, they would have reached the same conclusion."); *Carpenter v. Vaughn*, 888 F. Supp. 658, 666 (M.D. Pa. 1995) ("The holding of *Simmons* plainly was dictated by" *Gardner* and *Skipper*.); *O'Dell v. Thompson*, No. 3:92CV480 (E.D. Va. Sept. 6, 1994) (district court decision below) ("There is no question that the precedents guiding the Court's analysis in *Simmons* were well established. . . . [T]he application of those precedents was

also well-established. . . . ") (J.A. 199); *see also Stewart v. Lane*, 60 F.3d 296, 302 n.4 (7th Cir. 1995) ("it is arguable that *Skipper* compels the result in *Simmons*") (dicta), *supplemented*, 70 F.3d 955, *cert. denied*, 116 S. Ct. 2580 (1996).[13]

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The court of appeals' holding that *Simmons* announced a "new rule" should be reversed.[14]

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[13] Although some federal decisions have declined to apply *Simmons* retroactively, they involved cases where the petitioner's conviction became final prior to *Skipper*, *see Stewart*, 60 F.3d at 302 n.4, or the petitioner sought an extension of the holding in *Simmons*, *see Ingram v. Zant*, 26 F.3d 1047, 1054 n.5 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1137 (1995); *Kinnamon v. Scott*, 40 F.3d 731, 733 (5th Cir.), *cert. denied*, 115 S. Ct. 660 (1994); *Allridge v. Scott*, 41 F.3d 213, 222 n.11 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1959 (1995); *Johnson v. Scott*, 68 F.3d 106, 111 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1358 (1996); *Townes v. Murray*, 68 F.3d 840, 847-48 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 831 (1996).

In addition, two state-court decisions have held that *Simmons* is not retroactively applicable. In *Mueller v. Murray*, 478 S.E.2d 542 (Va. 1996), the Virginia court simply adopted the view of the court of appeals majority in this case, without any independent analysis or discussion. *See id.* at 548. In *Commonwealth v. Christy*, 656 A.2d 877 (Pa.), *cert. denied*, 116 S. Ct. 194 (1995), the Pennsylvania court concluded that, even if *Simmons* were compelled by this Court's precedents, it nevertheless announced a "new rule" under Pennsylvania law. *Id.* at 889 n.22. This holding was later rejected by a federal court in Pennsylvania. *Banks v. Horn*, 928 F. Supp. 512, 518-19 (M.D. Pa. 1996). The question of *Simmons*' retroactivity is a question of federal law. *See Yates v. Aiken*, 484 U.S. 211, 217-18 (1988).

[14] This Court's most recent decision interpreting *Teague*, *Gray v. Netherland*, 116 S. Ct. 2074 (1996), does not support a contrary result. In *Gray*, this Court held, 5-4, that requiring the prosecution to give adequate notice of evidence of future dangerousness that it intends to use in a capital sentencing proceeding would constitute a "new rule" under *Teague*. *Id.* at 2083-84. This rule is clearly different from the one at issue here and in *Simmons*: the asserted right to receive *notice* of evidence was not established by any prior cases, but the due process right to *rebut* such evidence was established by *Gardner* and *Skipper*.

II.

SIMMONS FALLS WITHIN THE SECOND EXCEPTION TO *TEAGUE*

Even if a decision announces a "new rule," it may nevertheless be applied retroactively if it falls within one of two established exceptions to *Teague*. The second of these exceptions allows for the retroactive application of "bedrock" procedural protections that implicate "the fundamental fairness and accuracy of the criminal proceeding," *Saffle v. Parks*, 494 U.S. 484, 495 (1989), and without which "the likelihood of an accurate conviction is seriously diminished," *Teague*, 489 U.S. at 311-13. The rule in *Simmons* is such a "bedrock" procedural protection.

The practice condemned in *Simmons* is a shocking one, viewed from the perspective of simple and basic fairness. How can a defendant get a fair trial on the issue of "future dangerousness" if he is not allowed to inform the jury accurately about whether he will spend his future years in prison? Indeed, it is hard to imagine evidence much *more* relevant to the future dangerousness of a convicted murderer than whether he is or is not eligible for parole. To hold a trial on that issue in which such a basic fact is concealed from the jury is like putting on *Hamlet* without Hamlet, or ignoring an elephant in the living room.

Simmons held that this practice is unconstitutional because, as the concurrence in *Simmons* observed, it is a "hallmark[] of due process" that a defendant be entitled to "meet the State's case against him." *Simmons*, 512 U.S. at 175 (O'Connor, J., concurring in the judgment). *Simmons* was predicated on the view that, where a prosecutor has raised the issue of future dangerousness, if the defendant is not permitted to rebut by presenting accurate information about his parole ineligibility, it is much less likely that the sentencing jury will decide the dangerousness issue accurately. The rule in *Simmons* is essential to protect a capital defendant against a misinformed and mistaken decision that could cost him his life, and is therefore within the second exception to *Teague*. As the dissent in the court of appeals stated:

> a strong argument could be made that when a state undertakes to impose a death sentence solely on the ground that a capital defendant poses a further danger, "fundamental fairness and the accuracy of the criminal proceeding" demand that he not be precluded from showing that he was, by virtue of the law of that state, parole ineligible.

95 F.3d at 1261 n.11 (quoting *Parks*, 494 U.S. at 495). (J.A. 336.)[15]

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[15] In light of conclusion that *Simmons* did not announce a "new rule," the dissent in the court of appeals did not find it necessary to resolve the applicability of the second *Teague* exception. 95 F.3d at 1261 n.11 (J.A. 336).

The court of appeals majority cursorily dismissed the second *Teague* exception claim with the remark that *Simmons* is not "on par" with a decision like *Gideon v. Wainwright*, 372 U.S. 335 (1963). 95 F.3d at 1239. (J.A. 277.) But *Simmons* is "on par" with *Gideon* in the relevant respect: both cases rest upon this Court's belief that certain procedural protections are essential to prevent a miscarriage of justice. *Compare, e.g., Williams v. Dixon*, 961 F.2d 448, 454-56 (4th Cir.) (rule forbidding unanimity requirement for jury finding of mitigating circumstances falls within the second *Teague* exception), *cert. denied*, 506 U.S. 991 (1992); *Nutter v. White*, 39 F.3d 1154, 1157-58 (11th Cir. 1994) (rule invalidating faulty reasonable-doubt instruction falls within second *Teague* exception); *Adams v. Aiken*, 41 F.3d 175, 178-79 (4th Cir. 1994) (same), *cert. denied*, 115 S. Ct. 2281 (1995). It is true that *Simmons* affects many fewer cases than *Gideon*, but that is no reason for refusing to apply *Simmons* retroactively. The second *Teague* exception exists despite, not because of, the extent of the disruption it causes to established practices.

As five judges of the Eleventh Circuit explained in concluding that the rule of *Gardner* falls within the second exception to *Teague*:

> *Teague* provides for retroactive application of "accuracy-enhancing procedural rules" which implicate the "bedrock procedural elements" of a criminal conviction. . . . The principle enunciated in *Gardner* is clearly such a rule. This rule is meant to provide for better fact-finding through adversarial procedure. *Gardner* allows crucial information to be clarified and supplemented. The result is that the sentencer has an improved

> and more accurate view of the facts upon which the sentence should be based.

Moore v. Zant, 885 F.2d 1497, 1525 (11th Cir. 1989) (*en banc*) (Johnson, J., dissenting), *cert. denied*, 497 U.S. 1010 (1990); *see also id.* at 1521 (Kravitch, J., dissenting) (*Gardner* is "based on the right of confrontation, and our adversarial system – unlike the inquisitorial method – depends above all else upon the right of confrontation to arrive at an accurate result.").[16]

Even more than *Gardner*, *Simmons* implicates the "fundamental fairness and accuracy of the criminal proceeding." The court of appeals erred in holding to the contrary.

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[16] In *Moore*, there was no majority opinion of the *en banc* court, and the plurality opinion did not address the question whether the rule of *Gardner* falls within the second exception to *Teague*. *Moore*, 885 F.2d at 1503 n.9, 1513 (plurality opinion).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case remanded with instructions to grant the writ of habeas corpus.

Dated: January 30, 1997

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No. 96-6867

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

J. D. NETHERLAND, WARDEN,
MECKLENBURG CORRECTIONAL CENTER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Is the rule this Court announced in 1994 in *Simmons v. South Carolina* one that all reasonable jurists in 1988 would have felt compelled to apply by then-existing precedent?

2. Is the *Simmons* rule comparable to the "watershed" rule announced in *Gideon v. Wainwright*, such that it should be applied retroactively to a state criminal case that became final nine years ago?

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STATEMENT OF THE CASE

Over twelve years ago, at about midnight on February 5, 1985, in Virginia Beach, Virginia, Joseph O'Dell brutally murdered Helen Schartner after raping and anally sodomizing her. O'Dell beat Schartner on her head with the barrel of his gun and then strangled her to death with his hands. The beating caused eight separate wounds which bled extensively. The strangulation was accomplished with such force that bones in her neck were broken and finger imprints were left on her neck. (JA 224-25).

O'Dell elected to defend himself at trial in the Circuit Court of Virginia Beach. At the conclusion of the guilt phase of trial, the jury found O'Dell guilty of the premeditated killing of Helen Schartner in the commission of, or subsequent to, rape. *See* Va. Code § 18.2-31(5). The jury also found O'Dell guilty of abduction, rape and forcible sodomy, but the trial court granted O'Dell's motion to set aside the abduction conviction. The jury fixed O'Dell's sentence for rape and forcible sodomy at 40 years for each. (JA 73).

During the separate hearing to determine the sentence for capital murder, *see* Va. Code § 19.2-264.3, O'Dell's extensive criminal history was considered. O'Dell had been tried as a juvenile at age 13 for breaking and entering and was found guilty. By the time he was 16, he had been convicted five times for auto theft and sentenced to prison. At the age of 17, he was convicted three times for assault and once for threatening bodily harm. At the age of 18, he was convicted of attempted escape from prison. (JA 228). When he subsequently was paroled, he committed five armed robberies and five

unauthorized uses of motor vehicles. He received sentences totaling 24 years in prison for these crimes. While in prison, O'Dell murdered another inmate, for which crime he was convicted of second-degree murder. (*Id.*). At the age of 33, O'Dell again was released and, seven months later, he committed a kidnapping and robbery in Florida against Donna Doyle, in a manner almost identical to the crimes committed later against Helen Schartner. (*Id.*).

Before the capital sentencing hearing in Virginia Beach, O'Dell requested that the court instruct the jury that, if he were sentenced to life in prison, he would be ineligible for discretionary parole under Virginia's "three-time-loser" statute governing Parole Board decisions. (JA 3, 40-43).[1] Under long-standing precedent from the Virginia Supreme Court, the trial court denied O'Dell's request. (JA 43). During the sentencing hearing, however, O'Dell's stand-by counsel questioned him on the witness stand as follows:

> Q. Now, you have been convicted of a number of felonies, and if – if you are sentenced to life, does that mean life without parole?

(JA 53). The prosecutor objected to the question, arguing that it was encompassed by the court's ruling prohibiting the requested jury instruction, and the court sustained

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[1] Virginia Code § 53.1-151(B)(1) provided, in pertinent part, that "[a]ny person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon . . . shall not be eligible for parole." The Virginia General Assembly amended the parole statutes in 1994 to make ineligible for parole all felons whose crimes were committed on or after January 1, 1995. Va. Code § 53.1-165.1.

the objection. (JA 54). O'Dell, however, was allowed to testify as follows:

> **[O'Dell]**: Without this conviction, I got to do sixteen flat years before I will ever get out. That's because I got a parole violation.
>
> * * *
>
> I am forty-five – will be forty-five on September 20th. It's just like having a life sentence to go back to prison. I got sixteen years. I do fifteen on a life sentence. Okay. If I went back to prison without this conviction, I am doing a life sentence. I am doing a life sentence. I am never going to get out. It don't make no difference. I am never going to get out.

(JA 55).

The court instructed the jury that it must sentence O'Dell to either death or life imprisonment, that the Commonwealth was obligated to prove one of two aggravating factors beyond a reasonable doubt before the jury could consider a sentence of death and that, even if it found one of the factors and no mitigating circumstances, it still could sentence him to life in prison. (JA 57-58). The prosecutor argued that O'Dell had "forfeited all right to life" due to the viciousness of the murder of Helen Schartner and due to O'Dell's demonstrated inability to refrain from committing violent acts. (JA 58-62, 64-66). The jury deliberated for 72 minutes before returning a verdict of death based on both of Virginia's sentencing factors: (1) there was a probability that O'Dell would commit criminal acts of violence that would constitute a continuing serious threat to society; and (2) O'Dell's conduct in committing the offense was outrageously wanton, vile or inhuman in that it involved an aggravated battery to the

victim beyond the minimum necessary to accomplish the act of murder. (JA 68-69). *See* Va. Code § 19.2-264.4.

In his automatic appeal of right to the Virginia Supreme Court, the Court unanimously affirmed the trial court's judgment. *O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491 (1988). (JA 73). O'Dell argued that the trial court had violated his constitutional rights when it refused his request for a parole instruction. The Virginia Supreme Court adhered to its settled rule against giving such information to the jury. (JA 108).

O'Dell filed a petition for a writ of certiorari in this Court in which he argued, among other things, that the Eighth and Fourteenth Amendments required that he be allowed to instruct the jury on his parole ineligibility. (Pet. for Cert. No. 88-5007 at 21-24). O'Dell specifically urged that "this Court should now recognize the relevance of parole ineligibility and require its admission." (*Id.* at 23). O'Dell contended that this Court had "not yet ruled" on this issue (*id.* at 21), and relied generally on such cases as *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978). (*Id.* at 22). The Court denied O'Dell's petition on October 3, 1988. *O'Dell v. Virginia*, 488 U.S. 871 (1988). O'Dell filed a petition for rehearing in which he again asked this Court to "consider ***whether*** such a right exists as a matter of constitutional law in capital cases." (Pet. for Reh'g., No. 88-5007 at 2, emphasis added). This Court denied the petition. *O'Dell v. Virginia*, 488 U.S. 977 (1988).

O'Dell filed a petition for a writ of habeas corpus in the Circuit Court of Virginia Beach that was denied on November 26, 1990 (JA 128), and his subsequent appeal of

that denial was dismissed by the Virginia Supreme Court. (JA 131, 281-95).

On petition for a writ of certiorari from that dismissal, O'Dell's lead argument was that the trial court's refusal to instruct his jury about his parole ineligibility violated his constitutional rights under *Gardner v. Florida*, 403 U.S. 349 (1977). (Pet. for Cert. No. 91-5655 at 17). O'Dell argued that, "[a]lthough this Court has not specifically evaluated a *Gardner* challenge based on a prosecutor's remarks regarding a defendant's parole eligibility, petitioner urges the Court ***to adopt*** the sensible approach articulated by the Fifth Circuit." (*Id.* at 20, emphasis added). This Court denied O'Dell's petition on December 2, 1991. *O'Dell v. Thompson*, 502 U.S. 995 (1991). (JA 132).[2]

O'Dell filed his federal habeas corpus petition on July 23, 1992, in the United States District Court for the Eastern District of Virginia. The district court rejected most of O'Dell's claims, but vacated his death sentence based on this Court's then-recent decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). (JA 205). The district court held that the rule in *Simmons* was dictated by the prior precedent of *Gardner*, and, citing Justice Souter's concurring opinion in *Simmons*, held as well that the rule was dictated by this Court's Eighth Amendment precedent. (JA 200).

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[2] Justice Blackmun wrote an opinion respecting the denial of certiorari in which Justices Stevens and O'Connor joined. *Id.* Justice Blackmun expressed the view that there were "serious questions as to whether O'Dell committed the crime or was capable of representing himself" and that O'Dell's case should "receive careful consideration" during federal habeas corpus review. (JA 137).

The Warden appealed to the United States Court of Appeals for the Fourth Circuit and O'Dell cross-appealed. The appeal initially was argued to a panel but the court then ordered it reargued *en banc* before issuing an opinion. On September 10, 1996, the *en banc* Court of Appeals reversed the district court's grant of the writ of habeas corpus and rejected O'Dell's claims of cross-error. *O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996) (*en banc*) (JA 222). A majority seven judges of the Court of Appeals agreed with the Warden that the rule in *Simmons* was "new" and that it did not qualify as an exception to the prohibition against application of new rules on collateral review. (JA 276). Six dissenting judges believed that the rule in *Simmons* was dictated by prior precedent and, thus, was fully applicable to O'Dell's collateral case. (JA 336, 340). All thirteen judges of the Court of Appeals rejected O'Dell's other claims. (JA 316-17, 340).

On October 24, 1996, the Circuit Court of Virginia Beach set O'Dell's execution date for December 18, 1996. (JA 343). On December 17, 1996, this Court stayed the execution and, on December 19, granted the petition for a writ of certiorari. The grant of review was limited to whether the rule in *Simmons* is "new" and, if so, whether it qualifies as an exception to the new rule doctrine. *O'Dell v. Netherland*, 117 S.Ct. 631 (1996). (JA 345).

SUMMARY OF ARGUMENT

In 1988, when O'Dell's case became final, no court anywhere had held unconstitutional the rule Virginia then followed which forbid jury instruction on parole matters. Virginia's sixty-year-old rule was the law in a

majority of States, a law that previously had been mentioned with approval by this Court in *California v. Ramos*, 463 U.S. 992, 1013 n.30 (1983).

The Virginia Supreme Court's rejection in 1988 of O'Dell's claim that the Virginia rule denied him due process was reasonable because no case dictated the result O'Dell sought. Neither *Gardner* nor *Skipper* spoke directly to the issue of whether a parole instruction was required in a capital sentencing proceeding; moreover, a reasonable jurist could have distinguished those cases from the rule O'Dell sought on the basis that they required, primarily under the Eighth Amendment, the admission during a capital sentencing hearing of factual evidence, whereas O'Dell sought, as a matter of due process, to instruct the jury on a matter of state law. The reasonableness of that distinction was only underscored by the fact that *Ramos* expressly had left to the discretion of the States the decision whether to instruct on parole.

The Court's later adoption of O'Dell's position in *Simmons* constituted the announcement of a new rule of constitutional law because it was not dictated at the time O'Dell's case became final in 1988, and it is not the type of exceptional, watershed rule of criminal procedure that may be applied retroactively in a federal collateral proceeding.

Even if the rule were found to apply to O'Dell's case, the error did not create the kind of substantial and injurious effect on the verdict that would be necessary before relief could be granted. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). O'Dell's criminal record of murders committed in and out of prison, as well as his documented history of other violent crimes, rendered marginal the question of whether parole ineligibility would keep him

from committing future violent crimes. The jury, moreover, sentenced O'Dell to death, not only because his criminal record made clear that only a death sentence would stop his brutal acts, but also because he committed an "outrageously wanton, vile or inhuman" premeditated murder, rape and sodomy against Helen Schartner.

ARGUMENT

I

THE RULE IN *SIMMONS* WAS NOT DICTATED BY PRECEDENT EXISTING IN 1988.

A. Justice O'Connor's Concurrence Supplies the Rule in *Simmons*.

In *Simmons*, the Court fashioned a specific rule requiring States to instruct their capital sentencing juries on a matter of state parole law. As Justice O'Connor supplied the necessary fifth vote and concurred on grounds narrower then those put forth by the plurality in *Simmons*, her concurrence is the controlling opinion of the case. *See Romano v. Oklahoma*, 512 U.S. 1, 9 (1994), *citing Marks v. United States*, 430 U.S. 188, 193 (1977). The "rule" of *Simmons* thus is that, if a State argues for imposition of the death penalty on the basis of the capital murderer's future dangerousness, and if such a defendant would be ineligible for release on parole as a matter of state law if given a sentence of life imprisonment, then due process requires that the defendant be allowed to inform his sentencing jury of that parole law either by instruction or defense argument. *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring). The *Simmons* plurality opinion expressly stated that the Court was not deciding whether Simmons

was entitled to relief under the Eighth Amendment. *Id.* at 162 n.4.

Justice O'Connor grounded her opinion in the basic guarantees of due process enunciated in *Clemons v. Mississippi*, 494 U.S. 738, 746 (1990), and *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). *Simmons*, 512 U.S. at 175. She found support for the rule in the specific due process right that was identified in one footnote, and in a concurring opinion, in *Skipper*. *See Skipper*, 476 U.S. at 5 n.1; *id.* at 9 (Powell, J., concurring). And she also found support for the rule in the plurality opinion in *Gardner*, 430 U.S. at 362. *See Simmons*, 512 U.S. at 175.

Justice O'Connor wrote that the Court "previously [had] noted with approval" in *Ramos*, the rule in many States that prohibited jury instruction on pardon and parole matters, and that that approval remained in force for States where parole was available. *Id.* at 176. Her concurrence, however, carved out an exception to that general approval:

> In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact.
>
> * * *
>
> When the State seeks to show the defendant's future dangerousness, however, the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case. I agree with the Court that in such a case the defendant should be allowed to bring his parole ineligibility to the jury's attention. . . . [a]nd ***despite our general deference to state decisions regarding what the jury should be told about sentencing***, I agree that due process requires that the defendant be allowed to do so in cases in which the only

> available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future.

Id. at 176-177 (emphasis added).

In *Simmons*, the prosecutor had argued that the death penalty would be an "act of self-defense" against a vicious predator of elderly women and Simmons had agreed that "he only preyed on elderly women, a class of victims he would not encounter behind bars." *Id.* at 176. As Justice O'Connor observed, "[u]nlike in *Skipper*, where the defendant sought to introduce factual evidence tending to disprove his future dangerousness," Simmons "sought to rely on the operation of South Carolina's sentencing law in arguing that he would not pose a threat to the community if he were sentenced to life imprisonment." *Id.*

Out of these specific facts, *Simmons* created a new rule applicable to all capital cases that meet the following criteria: (1) the State argues for death based on "future dangerousness" and (2) state law would make the defendant ineligible for parole if he were given a life sentence.

O'Dell's case meets these criteria, but the new rule may not be used to invalidate his death sentence which already was six years old when *Simmons* was decided.

B. O'Dell's Death Sentence May Not Be Vacated Unless All Reasonable Jurists In 1988 Would Have Agreed That The Rule In *Simmons* Was The Law.

O'Dell contends that he is entitled to retroactive application of the rule in *Simmons* "if, at the time [his] conviction became final, a 'reasonable jurist' would have

thought that it was compelled by existing precedent." (Pet. Br. at 11, 14). Under O'Dell's view, if he can prove that *Simmons* stated a reasonable position, then he is entitled to its benefits, simply because "a" reasonable jurist in 1988 could have articulated the later holding of the case. O'Dell's version of the new rule doctrine would turn the retroactivity standard on its head, and this Court expressly has rejected the identical argument.

In *Graham v. Collins*, 506 U.S. 461 (1993), the death-row inmate argued that the Texas "special issues" system of jury sentencing prevented consideration of his mitigating evidence of youth, family background and positive character traits. 506 U.S. at 463. Graham contended that it would have been reasonable to conclude in 1984 when his case became final that the Texas system prevented such consideration. *Id.* at 477. The Court squarely rejected Graham's formulation of the new rule test, holding that "[r]ather, the determinative question is whether reasonable jurists reading the case law that existed in 1984 could have concluded that Graham's sentencing was ***not*** constitutionally infirm." *Id.* (Emphasis in original). The Court found Graham's claim to constitute a new rule because, "[w]e cannot say that ***all*** reasonable jurists would have deemed themselves compelled to accept Graham's claim in 1984." *Id.* (Emphasis added).

As the Court made clear in *Butler v. McKellar*, 494 U.S. 407, 414 (1990), "the 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Thus, if a particular outcome "was susceptible to debate among reasonable minds," then, *a fortiori*, it could not have been "compelled" by precedent. *Id.* Simply put, if the caselaw

could be read reasonably to support the state court's decision at the time the decision was made, then the decision stands.

This standard, as Justice Kennedy wrote for the Court in *Saffle v. Parks*, 494 U.S. 484, 488 (1990), is a "functional view of what constitutes a new rule" that validates the "underlying purposes of the habeas writ." Primary among such purposes is the writ's deterrent value that provides an "incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." *Id., quoting Teague v. Lane*, 489 U.S. 288, 306 (1989) (quoting *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)). Thus, "the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, ***and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine***." *Sawyer v. Smith*, 497 U.S. 227, 234 (1990) (emphasis added); *see also Teague*, 489 U.S. at 308 (Opinion of O'Connor, J.) ("it has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule").[3]

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[3] The new rule doctrine equally is informed by the important interests of federalism and comity. *See Teague*, 489 U.S. at 310 (Opinion of O'Connor, J.) ("state courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."), *quoting Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982). *See also Wright v. West*, 505 U.S. 277, 293 (1992) (Opinion of Thomas, J.) (federal habeas review " 'entails significant costs' [because] 'it disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.' "), *quoting Engle*, 456 U.S. at 126 and *Duckworth v. Eagan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring); *see also* Brief for Criminal Justice Legal Foundation as Amicus Curiae in *Lambrix v. Singletary*, O.T. 1996, No. 96-5658, App. 5 ("Execution should not be a function of whether the legislature and judiciary of the state correctly predicted the next three twists in the switchback trail of capital punishment jurisprudence. . . . Delay in the execution of judgments imposing the death penalty frustrates the public interest in deterrence and eviscerates the only rational justification for that type of punishment."), *citing* Judge Alex Kozinski & Sean Gallahgher, Death: The Ultimate Run-On Sentence, 46 Case West. Res. L. Rev. 1, 4 (Fall 1995)("Whatever purpose the death penalty is said to serve – deterrence, retribution, assuaging the pain suffered by the victims' families – these purposes are not served by the system as it now operates.").

At its very core, a new rule is one that simply would be unfair to apply retroactively because it was not dictated by prior precedent. This Court has discussed this particular brand of retroactive "unfairness" in terms of whether or not a court reasonably could have read this Court's then-existing cases to support the decision it was making. *See Graham*, 506 U.S. at 472. The Court of Appeals below accurately stated that "the new rule analysis fundamentally asks the same questions as does the qualified immunity analysis – whether a contrary conclusion would have been ***objectively unreasonable***." (JA 237, emphasis in original). *See Sawyer*, 497 U.S. at 236. The issue is not, as O'Dell argues, whether a court reasonably could have fashioned the *Simmons* rule; quite obviously this Court did just that in *Simmons*. O'Dell's method impermissibly "endues the jurist with prescience, not

reasonableness." *Stringer v. Black*, 503 U.S. 222, 244 (1992) (Souter, J. dissenting).

Reasonableness must be assessed by a determination of whether a later-announced rule was "dictated" at the time of the challenged decision, with due consideration for the "legal landscape" in which the challenged decision rests. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). The later-announced rule need not have been "foreclosed" by prior precedent in order for the State to prevail, *see id.* at 393, and, indeed, may even have been "controlled," "informed," "governed by," or have been within the "logical compass" of, earlier cases. *See Butler*, 494 U.S. at 415; *Saffle*, 494 U.S. at 491.[4]

Significantly, the prior precedent must "speak directly" to the later-announced rule. *Saffle*, 494 U.S. at 490. For example, the fact that the rule in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) – making unconstitutional a death sentence based upon the prosecutor's inaccurate argument that the jury bore little responsibility for the sentence – arose from established Eighth Amendment law

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[4] Indeed, the new rule doctrine, with its required "reasonableness" inquiry, was codified, strengthened and expanded last Spring by Congress. *See* 28 U.S.C. § 2254 (d), as amended Pub. L. No. 104-132 (Apr. 24, 1996), 110 Stat. 1212, 1219 (no federal habeas petition may be granted with respect to any claim adjudicated on its merits in state court unless the state court decision was either an unreasonable application of clearly established Federal law as determined by this Court, or was based on an unreasonable determination of the facts as presented in state court); *see also* Brief for Senator Orrin G. Hatch and 53 other Senators and Congressmen as Amicus Curiae in *Felker v. Turpin*, 116 S.Ct. 2333 (1996), App. 2 ("the Act also codifies and strengthens the deference standard adopted in *Teague v. Lane*").

requiring reliability in capital sentencing, did not mean that the *Caldwell* rule was "dictated" by that established law. *Sawyer*, 497 U.S. at 227. Likewise, the rule in *Gardner*, that a death sentence may not be based on information the defendant had no opportunity to deny or explain, did not "dictate" a prisoner's later-proposed rule that he was entitled to notice of evidence used against him at sentencing. *See Gray v. Netherland*, 116 S.Ct. 2074, 2084 (1996). As the Court held in *Gray*, "the new-rule doctrine 'would be meaningless if applied at this level of generality.' " *Id.*, *quoting Sawyer*, 497 U.S. at 227.

O'Dell argues that the rule in *Simmons* was "compelled" by the rules in *Gardner* and *Skipper* and that a reasonable jurist, in essence, should have seen *Simmons* coming. His argument simply cannot withstand scrutiny under this Court's settled "new rule" jurisprudence, as the well-reasoned opinion of the court below demonstrated.

C. The "Legal Landscape" in 1988 Reasonably Supported Virginia's Sixty-Year-Old Practice Prohibiting Jury Consideration of Parole Matters.

O'Dell's criminal conviction for capital murder and sentence of death became final on October 3, 1988, when this Court denied his petition for a writ of certiorari on direct appeal. *See Caspari*, 510 U.S. at 390, *citing Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). As of that date, no court had held that the rule employed in Virginia prohibiting jury instruction on a defendant's parole status was

constitutionally impermissible.[5] O'Dell does not dispute this fact regarding the legal landscape in 1988; rather, his primary argument is, in essence, that this Court already has decided the issue of *Simmons'* retroactivity in his favor because the plurality opinion in *Simmons* used the word "compelled." (Pet. Br. at 14-16). The Fourth Circuit, however, correctly observed that Justice O'Connor's controlling opinion "avoids any suggestion that the court's decision was 'compelled' by prior case law." (JA 268).[6] And, there is no indication other than the choice of verb itself that the plurality opinion was intended to answer the question upon which certiorari was granted in O'Dell's case.

Indeed, as Justice Scalia has observed, it is in our judicial tradition of *stare decisis* to find a decision "inherent" in earlier cases. *Penry v. Lynaugh*, 492 U.S. 302, 353 (1989) (Scalia, J., dissenting). The language a court uses to explain the basis for its ruling, including the fact that it almost always will be governed, ruled, controlled, etc., by

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[5] The Virginia Supreme Court's rule can be traced as far back as 1929 when, in *Dingus v. Commonwealth*, 149 S.E. 414, 415, the Court held that comments by the prosecutor about possible pardon were improper because the power to pardon was solely an Executive Branch function and should be kept separate from the Judicial Branch of government. *See Hinton v. Commonwealth*, 247 S.E.2d 704, 706 (Va. 1978) (same rule for comments about parole); *Poyner v. Commonwealth*, 329 S.E.2d 815, 836-837 (Va.) (same rule for capital cases), *cert. denied*, 474 U.S. 865 (1985).

[6] O'Dell apparently equates Justice O'Connor's use of the word "requires" with "compels," (see Pet. Br. at 15, quoting *Simmons*, 512 U.S. at 175), but her use of the verb "requires" merely was a restatement of the Court's alternate, due process holding in *Skipper*. Just as in the plurality opinion, there is no "new rule" analysis contained in her concurrence.

prior precedent, simply does not determine whether reasonable jurists at some point in the past would have felt compelled by then-existing precedent to decide an issue in the same way this Court later decided it.

There certainly is no indication in Justice Blackmun's plurality opinion that he was "surveying" the "legal landscape" of 1988 to determine whether a reasonable jurist then could have believed that Virginia's rule passed constitutional muster. *See Caspari*, 510 U.S. at 390 (requiring survey). Without such an explicit analysis, there simply is no reason to believe that the *Simmons* plurality engaged in some type of indirect new rule analysis, much less to regard it as evidence that the Virginia Supreme Court acted unreasonably in 1988.

Quite obviously, *Simmons* was based primarily upon the due process concerns discussed in *Gardner* and *Skipper*. The question of whether a reasonable jurist in 1988 could have rejected O'Dell's claim of error, however, is another matter entirely. Although there were four primary cases from this Court that bore upon the issue, those four cases – *Gardner*, *Skipper*, *Ramos* and *Caldwell* – contained no fewer than ***sixteen*** opinions. Jurists in 1988, while duty-bound to apply these cases in good faith to their own rulings, nevertheless were faced with undeniably mixed signals, not only as to which constitutional provisions actually governed, but also as to what rules they were required to follow.

1. No court in 1988 had held it unconstitutional to refuse to instruct a jury on parole eligibility.

Gardner was decided in 1977. *Skipper* was decided in 1986. Neither case held that there is a due process right to

inform a jury that the defendant will be ineligible for parole if sentenced to life imprisonment. In 1988, no federal or state court had rendered a decision with the holding of *Simmons*, a fact O'Dell admits when he says that *Simmons* was a "variation on the facts in *Skipper*." (Pet. Br. at 17). Given the uncontested fact that there was ***no*** authority in 1988 prohibiting the Virginia practice, O'Dell is left with the argument that *Gardner* and *Skipper* indirectly commanded the prohibition simply because *Simmons* was based on those two cases. The question, then, is simple: could a reasonable jurist in 1988 have believed that the Virginia rule passed constitutional muster despite the holdings of *Gardner* and *Skipper*? The answer undeniably is yes.

a. Gardner v. Florida

A reasonable jurist in 1988, looking at *Gardner*, would have been confronted with a splintered decision. Daniel Gardner was convicted of capital murder in Florida and given a life sentence by the jury based on its finding that the mitigating factors outweighed the aggravating factors. *Gardner*, 430 U.S. at 353.

The trial judge considered a presentence investigation report, a portion of which, under Florida practice, was confidential and not provided to the defense. The judge sentenced Gardner to death based on his finding that the aggravating factor of vileness outweighed the mitigating factors. *Id.* On appeal, the Florida Supreme Court rejected Gardner's claim that he had been prejudiced by the use of a secret report even though the appellate court's record did not even contain the confidential part of the report. *Id.* at 354.

Justice Stevens authored the plurality opinion for this Court in which Justices Stewart and Powell joined. The plurality considered the State's justifications for the practice which permitted the use of a confidential report, but found them lacking under the Due Process Clause. The plurality noted, however, that "due process is flexible and calls for such procedural protections as the particular situation demands," that "not all situations calling for procedural safeguards call for the same kind of procedure," *id.* at 358 n.9, but that, in Gardner's capital case, the risk that the confidential information "may be erroneous, or may be misinterpreted," was simply too great to allow such a report to be considered without disclosure to the defendant. *Id.* at 359.

There were three concurrences in *Gardner*. Chief Justice Burger concurred in the judgment without writing an opinion. *Id.* at 362. Justice Brennan concurred in the plurality's due process ruling, and also concurred in the judgment on the grounds that the Eighth Amendment forbade the death penalty in all circumstances. *Id.* at 364-65. Justice Blackmun concurred in the judgment on the basis of the Court's Eighth Amendment line of capital cases. *Id.* at 364. Finally, Justice White concurred in the judgment and expressed the view that the error in Gardner's case stemmed "solely" from the Eighth Amendment. *Id.* at 364. Justice White saw "no reason" to address the applicability of the Due Process Clause. *Id.*[7]

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[7] Then-Justice Rehnquist dissented from the decision in *Gardner*, expressing the view that the Eighth Amendment did not involve sentencing procedures, and observing that Florida's procedure of using confidential reports never had been held to violate the Due Process Clause. *Gardner*, 430 U.S. at 371 (Rehnquist, J., dissenting).

Applying the rule in *Marks v. United States*, Justice White's concurrence is the controlling opinion in *Gardner* because his fifth vote was necessary to the majority holding and was on the narrowest grounds. A reasonable jurist in 1988, therefore, could have believed that *Gardner* stood for the quite narrowly-defined rule that the Eighth Amendment, but not necessarily the Due Process Clause, prohibited the State from sentencing a defendant to death on the basis of a secret report provided to the sentencer.

In the context of the *Simmons* new rule analysis, it would have been entirely reasonable for a jurist looking at *Gardner* in 1988 to believe that *Gardner* did not dictate the *Simmons* rule that due process entitled the defendant to instruct the jury he would not be eligible for parole.[8] *Gardner*, moreover, did not address jury instruction in capital sentencing at all, much less instruction regarding parole matters. It quite reasonably could (and can) be read to stand for a general right to notice of evidence being used against a defendant in a capital sentencing hearing. *See Gray*, 116 S.Ct. at 2084 (prisoner relied "principally" on general right of notice in *Gardner* in asking for new rule requiring notice of sentencing evidence).

b. Skipper v. South Carolina

A reasonable jurist in 1988 also would have looked at *Skipper*, in which the Court expressly had stated that certiorari had been granted only to consider whether the

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[8] O'Dell sought relief on the basis of both the Eighth Amendment and the Due Process Clause. It was not until *Simmons* was decided that the "right" was identified as one involving only due process and not the Eighth Amendment. *See Simmons*, 512 U.S. at 162 n.4.

South Carolina direct appeal decision was inconsistent with *Lockett* and *Eddings*, and that "the only question before us is whether the exclusion [of evidence at sentencing] deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment." *Skipper*, 476 U.S. at 4.

Skipper had been prevented by South Carolina law from presenting to the jury evidence that he had made a good adjustment while in jail even though the prosecutor had been allowed to argue that Skipper would pose disciplinary problems if sentenced to prison instead of to death, and that he likely would rape other prisoners. *Id.* at 3, 8. The Court held it error to exclude Skipper's evidence because a capital sentencing jury may " 'not be precluded from considering, ***as a mitigating factor***, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " *Id.* at 4 (emphasis added), *quoting Eddings*, 455 U.S. at 110. The Court noted that it had held previously that a State may base imposition of the death penalty on the defendant's "future dangerousness" and concluded that evidence like Skipper had offered must be considered potentially mitigating. *Skipper*, 476 U.S. at 5. In one footnote, the Court stated as follows:

> The relevance of evidence of probable future conduct in prison as a factor in aggravation or mitigation of an offense is underscored in this particular case by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison. Where the prosecution specifically relies

> on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." [*Gardner v. Florida*].

Id. at 5 n.1.

Justice Powell wrote a concurring opinion in which Chief Justice Burger and Justice Rehnquist joined. *Id.* at 9. Justice Powell wrote that neither *Lockett* nor *Eddings* required vacating Skipper's death sentence. *Id.* He believed, rather, that the sole error was the failure to allow Skipper to rebut the prosecution's evidence and argument, and he therefore based his opinion on the plurality opinion in *Gardner*. *Id.* at 10. Justice Powell explained that, in his opinion, the Eighth Amendment rule announced by the majority was contrary to *Lockett* and *Eddings* because those cases had left the decision of what evidence constituted mitigation up to the States, not the Court. *Id.* at 11. He believed that evidence of a capital defendant's good conduct in jail could be prohibited by a State, "as long as the evidence is not offered to rebut testimony or argument such as that tendered by the prosecution here" because "[s]uch evidence has no bearing at all on the 'circumstances of the offense,' since it concerns the defendant's behavior after the crime has been committed" and says nothing "necessarily relevant about a defendant's 'character or record,' as that phrase was used in *Lockett* and *Eddings*." *Id.* at 11-12.

Nothing in *Skipper* addressed the issue of whether, or what, a State must instruct a capital sentencing jury,

under either the Eighth or Fourteenth Amendments. A jurist reading *Skipper* in 1988 reasonably could have believed that the case stood for a broadening of this Court's Eighth Amendment rulings. After all, with the exception of one footnote, the holding expressly was based exclusively on the Eighth Amendment question upon which certiorari had been granted. And, most importantly, it would not have been ***unreasonable*** to have considered the due process footnote in the majority opinion, coupled with Justice Powell's concurrence, to stand only for its stated narrow proposition that a defendant must be allowed to present his record of good conduct in jail if the prosecution presented evidence of, or argued that, the defendant behaved badly in jail. In other words, a jurist reasonably could have believed in 1988, that, unless the issue before him involved a capital defendant who was seeking to present evidence of his good behavior in jail, then *Skipper* simply did not apply to the case.

Thus, the Virginia Supreme Court reasonably could have concluded that *Skipper* did not dictate a ruling in O'Dell's favor because he was not asking to present evidence of his good conduct in jail. In fact, O'Dell was asking for an instruction saying that the State already had determined his conduct to be so bad and his "future dangerousness" so sure, that the Parole Board would not consider him eligible for release from prison if he received a life sentence. Even assuming a court in 1988 could not have read *Skipper* reasonably to be limited to an Eighth Amendment violation – an assumption far from apparent – it certainly could have so read the case as applying only to questions involving factual evidence of the defendant's good character.

O'Dell admitted he was dangerous and sought an instruction to the jury regarding how the Parole Board would deal with such a dangerous individual. Surely a court in 1988 reasonably could have concluded that neither *Skipper* nor any other decision from this Court dictated that O'Dell was entitled to such an instruction. Virginia fully complied with the Eighth and Fourteenth Amendment requirements under an entirely reasonable reading of *Skipper*.

c. Lower court decisions

Usually, a petitioner claiming the benefit of a new decision from this Court can point to at least some lower court decision supporting his position. *See, e.g., Sawyer*, 497 U.S. at 240 (petitioner pointed to numerous state court decisions, both embodying the ruling in *Caldwell* and holding that the rule in *Caldwell* did not change prior law). O'Dell can point to none.

The most that O'Dell can do is cite to four state court decisions which ***post-dated the 1988 Virginia Supreme Court decision in his case***. Even so, only one of these post-*O'Dell* cases comes close to supporting the ruling O'Dell wanted. O'Dell cites two cases from Pennsylvania, decided in 1989 and 1990, respectively. He contends these cases demonstrate that no reasonable court upheld the no-parole instruction rule after *Skipper*, but neither case even cites *Skipper*, much less says what he contends. In *Commonwealth v. Strong*, 563 A.2d 479 (Pa. 1989), the trial judge had refused to answer the jury's question of whether the capital defendant would be eligible for parole. 563 A.2d at 485. The judge, instead, gave the jury an instruction that it was not to consider anything other than the evidence in the case. *Id*. The Pennsylvania

Supreme Court upheld the trial judge's action, referring to its almost forty-year-old rule forbidding the giving of any information about pardon or parole to juries. *Id*. at 486.[9]

The other Pennsylvania case, decided in 1990, is no different: it does not cite *Skipper*, does not limit its holding to non-future dangerousness cases, and specifically states, in the broadest terms, that "[w]e have held that parole, pardon, and commutation of sentence are matters that should not enter in any manner into a jury's deliberations regarding the sentence to be imposed in a first degree murder case." *Commonwealth v. Henry*, 569 A.2d 929, 941 (Pa. 1990), *cert. denied*, 499 U.S. 931 (1991).

The third case O'Dell relies on is the decision of the South Carolina Supreme Court that this Court overturned in *Simmons* itself. Obviously, that case espoused the view that O'Dell says was ***contrary*** to *Skipper*. *See State v. Simmons*, 427 S.E.2d 175 (S.C. 1993).[10]

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[9] O'Dell says that *Strong* is limited to cases which did not involve argument by the prosecution on future dangerousness, but he is wrong. Strong's jury found, as one of three aggravating factors, that "he had a significant history of felony convictions involving the use or threat of violence to the person." 563 A.2d at 457.

[10] O'Dell argues that South Carolina somehow recognized the error of its ways in *Simmons* because it held that the instruction actually given in response to the jury's question answered the jury's question. (Pet. Br. at 28). What the South Carolina Supreme Court actually held, however, was that jury instructions on parole were a matter of state law, its prior cases had not resolved the question of whether juries should be told about parole ineligibility and that the issue need not be resolved in *Simmons* because Simmons got what he wanted in the trial court's "plain meaning" charge. *Simmons*, 427 S.E.2d at

Finally, O'Dell relies on what he calls the only case after *Skipper* "that gave real consideration to the issue [that] presaged the holding of *Simmons*." (Pet. Br. at 29). In *Turner v. State*, 573 So.2d 657 (Miss. 1990), the Mississippi Supreme Court held that prosecutors must hold a hearing to determine a defendant's habitual-offender status in order to determine the defendant's parole eligibility before conducting the sentencing phase of the capital murder trial. 573 So.2d at 675. The court ruled that principles of fundamental fairness required that the jury be told whether the defendant will be eligible for parole. *Id.* The Court did not base its decision on *Gardner* or *Skipper*, but rather on the Eighth Amendment holding of *Jurek v. Texas*, 428 U.S. 262 (1976), that "all possible relevant information about the individual" be provided to the sentencer. *Turner*, 573 So.2d at 675.

Significantly, the opinion in *Turner* was substituted for a prior opinion in the same case that had come to ***exactly the opposite conclusion***. *See Turner v. State*, No. 03-82, 1989 Miss. LEXIS 483, * 43-45 (Miss. 1989) ("This Court has consistently held that the State may not introduce evidence or comment upon the fact that a person convicted of capital murder and sentenced to life . . . will be eligible for parole in ten (10) years. The same shoe must be worn by the appellant. The same law must apply to the defendant/appellant as to the state/prosecution. Both are entitled to a fair trial under the same rules and procedures."). *Turner* contained no *Skipper*-dictated rule and, in fact, is a perfect example of a court dealing with

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178-79. The court did not discuss *Skipper* or imply in any way that its jury charging decisions were unconstitutional.

an issue that obviously was "susceptible to debate among reasonable minds." *See Butler*, 494 U.S. at 415.

The lower court cases cited by O'Dell do not stand for the proposition that a ruling in his favor was "compelled" after *Skipper*. If anything, they stand for the opposite conclusion: reasonable jurists in 1988, and after, believed that there was no constitutional impediment to a rule prohibiting the giving of parole information to the jury.

2. In 1988, courts expressly approved of the rule forbidding parole information.

As shown above, a reasonable jurist in 1988 would have been justified in believing that Virginia's long-established rule passed constitutional muster because no case anywhere had ruled otherwise. To the extent, however, that any court might have believed otherwise – although apparently none did – such a belief would have been completely unfounded in 1988 given the then-existing ***express approval*** of Virginia's rule from this Court as well as lower courts.

a. California v. Ramos

The court below correctly deemed "[o]f critical significance," this Court's 1983 decision in *Ramos*. (JA 241). *Ramos* "not only held that a defendant was ***not*** constitutionally entitled to apprise the jury of the Governor's power to commute a death sentence (when the trial court had already instructed the jury of the Governor's power to commute a life sentence without parole), but also expressly noted with approval the practices in many states of forbidding any reference to the possibility of pardon, commutation, or parole." (JA 242).

In *Ramos*, the Court upheld California's "Briggs Instruction" that told the jury the Governor could commute a sentence of life without parole to a sentence of life with parole. *Ramos*, 463 U.S. at 995. The Court made clear that such an instruction was not constitutionally required. *See id.* at 1013-14 ("Our conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their States should not be permitted to consider the Governor's power to commute a sentence.").

Although the Court's decision rested primarily on the Eighth Amendment, the Court also specifically considered whether the Briggs Instruction violated the due process concerns identified in *Gardner*, and found that it did not. *See id.* at 1004.[11] In fact, the Court found that the

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[11] O'Dell reads *Ramos* actually to require the rule in *Simmons* because, in *Ramos*, the Court observed that Ramos had not been denied the right of rebuttal required by *Gardner*. (Pet. Br. at 22). What the Court held, however, was that "*Gardner* provides no support for respondent," because the Briggs Instruction was not inaccurate (like the secret report in *Gardner* potentially was) and there was no bar to Ramos' presentation of evidence or argument regarding the subject of the instruction, *i.e.*, the Governor's power to commute a life sentence. *See Ramos*, 463 U.S. at 1004.

O'Dell's spin on *Ramos'* discussion of *Gardner*, therefore, is a far cry from what a reasonable jurist would have read. *Ramos* broadly approved of rules like Virginia's, narrowly approved of California's break with most other States' practices and simply held that, if the State elects to go down California's path, it must make sure (1) the instruction is accurate and (2) the defendant is not put in a position, like *Gardner*, where he has no opportunity to rebut the instruction's impact. A reasonable reading in 1988 of *Ramos'* discussion of *Gardner* is that if a State elects the safe path of not allowing any instruction on the issues of pardon or

Briggs Instruction "[did] not violate any of the substantive limitations this Court's precedents have imposed on the capital sentencing process." *Id.* at 1013. Moreover, as the Fourth Circuit observed, "it was apparent in 1988, as it is still today, that the Eighth Amendment's principles inform the Due Process capital sentencing inquiry," and "a reasonable jurist could hardly be faulted either for resorting to both lines of the Court's cases, as the Court itself has repeatedly done, or for relying only on the line directly implicated in the case before him." (JA 242).

The effect of *Ramos'* broad statements of deference to state court decisions regarding what information, if any, about pardon and parole and other post-sentencing information should be admitted, simply cannot be overstated. Discussing *Gregg v. Georgia*, 428 U.S. 153 (1976), *Ramos* emphasized that "the joint opinion did not undertake to dictate to the State the particular substantive factors that should be deemed relevant to the capital sentencing decision." *Ramos*, 463 U.S. at 999; *see also id.* at 1000 ("'the deference we owe to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy'' ") (quoting *Gregg*, 428 U.S. at 176). The Court held that the Constitution limited the State only in forbidding vague sentencing criteria, requiring consideration of the defendant's character or record and the circumstances of the offense, forbidding secret presentencing reports, and that "[b]eyond these limitations . . . the Court has deferred to

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parole, it need not worry about *Gardner's* requirement of rebuttal at all.

the State's choice of substantive factors relevant to the penalty determination." *Ramos*, 463 U.S. at 1000-1001.

Significantly, Ramos' argument against the Briggs Instruction, that was rejected by the Court, was identical in principle to the argument Simmons later successfully made. Ramos argued that if the jury was told that the Governor could commute his life sentence to life with parole and not told that the Governor also could commute a death sentence, then the jury would vote for death solely as a means to negate the Governor's power to provide for his eventual release. *Ramos*, 463 U.S. at 1010-11. Simmons argued likewise that if the jury was not told about his parole ineligibility, it would vote for death solely as a means to prevent his eventual release. *Simmons*, 512 U.S. at 159.

Not only did a majority of the Court in *Ramos* reject the prisoner's logic, but Justice Marshall, endorsing the prisoner's argument in his dissent, described it in terms the Court later ***adopted*** in *Simmons*. *See Ramos*, 463 U.S. at 1016 (Marshall, J., dissenting) ("The Briggs Instruction may well mislead the jury into believing that it can eliminate any possibility of commutation by imposing the death sentence. . . . The instruction . . . erroneously suggests to the jury that a death sentence will assure the defendant's permanent removal from society whereas the alternative sentence will not.").

A reasonable jurist in 1988 easily could have concluded, without more, that *Ramos* upheld the State's prerogative to prohibit juries from considering post-sentencing information which, in the State's judgment, might be too speculative or misleading. *Ramos*, however, went much, much further. The majority opinion specifically stated that it did not "override" the decisions of

many States which had chosen to ***eliminate altogether*** any mention of pardon or parole in its sentencing determinations and cited to the decisions of seven States. *Ramos*, 463 U.S. at 1013 n.30 ("Many state courts have held it improper for the jury to consider or to be informed – through argument or instruction – of the possibility of commutation, pardon, or parole.").

Justice Marshall, in dissent, cited many more cases, including two decisions of the Virginia Supreme Court. *See id.* at 1020 n.5 (citing *Jones v. Commonwealth*, 72 S.E.2d 693, 697 (Va. 1952)) and *id.* at 1027 n.13 (citing *Clanton v. Commonwealth*, 286 S.E.2d 172 (Va. 1982)). Of course, in *Clanton*, the Virginia Supreme Court had reaffirmed its prior holdings in *Hinton* and *Stamper v. Commonwealth*, 257 S.E.2d 808 (Va. 1979), *cert. denied*, 445 U.S. 972 (1980), both of which decisions expressly were relied on by the trial judge in O'Dell's case to deny O'Dell's request for a parole instruction. (JA 250).

Perhaps even more telling to reasonable jurists in 1988 was the fact that every dissenting opinion in *Ramos* came down on the side of a constitutional rule ***prohibiting*** jury consideration of pardon or parole. *See Ramos* 463 U.S. at 1025 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.) (recognizing and approving of the practice of "nearly every jurisdiction which has considered the question" of not "permitt[ing] [juries] to consider commutation and parole"); *see also id.* at 1029 (Stevens, J., dissenting). As the Fourth Circuit pointed out, "[t]he dispute between the majority and the dissenters was whether the States could ***ever*** allow the jury to consider matters such as commutation, pardons or parole." (JA 248). The majority decided in favor of leaving the decision to the States, but the dissenters went

even further, believing that States ***never*** should be allowed to permit such instruction or argument. *See id.* at 1021-23 (Marshall, J., dissenting) ("In my view, the Constitution ***forbids*** the jury to consider any factor which bears no relation to the defendant's character or the nature of his crime, or which is unrelated to any penological objective that can justify imposition of the death penalty.") (emphasis added).

A reasonable jurist in 1988 considering whether the State could forbid instruction on parole certainly would have zeroed in on *Ramos* because it was ***the*** case closest to being on point to the issue at hand. Reasonably read, *Ramos* told that reasonable jurist that the practice of keeping such information from juries was not only acceptable constitutionally, but also the clear majority rule nationwide.

b. Caldwell v. Mississippi

The Fourth Circuit correctly concluded that, in 1988, a reasonable jurist faced with O'Dell's claim would have considered *Caldwell*. (JA 253). *Caldwell* vacated a death sentence because the trial judge and prosecutor had told the jury that the real responsibility for the sentence lay with other authorities who would review the case after the jury was discharged. 472 U.S. at 328-29 (plurality opinion). Justice Marshall, writing for a plurality of the Court, distinguished the error in *Caldwell* from the Briggs Instruction in *Ramos* because, in his opinion, the *Caldwell* argument was neither accurate nor relevant. *Id.* at 336. Justice O'Connor concurred in part and in the judgment, but wrote separately to clarify that *Ramos* had not barred States from giving accurate information to the jury about post-verdict processes:

> Jurors may harbor misconceptions about the power of state appellate courts or, for that matter, this Court to override a jury's sentence of death. Should a State conclude that the reliability of its sentencing procedure is enhanced by accurately instructing the jurors on the sentencing procedure, including the existence and limited nature of appellate review, I see nothing in *Ramos* to foreclose ***a policy choice*** in favor of jury education.

Id. at 342 (emphasis added).

Justice O'Connor's opinion not only is the "controlling" opinion of the case, *see Romano*, 512 U.S. at 9, but could have been read reasonably in 1988 to mean that the Court had not backed away from the broad statements of deference to the States it had made in *Ramos*. A reasonable jurist could have believed that it was a "policy choice" as to whether or not to tell the jury about ***anything*** occurring after the verdict. Indeed, a ***cautious***, even ***safe*** approach for a State to take in 1988 would have been to prohibit altogether any instruction or evidence regarding post-verdict review or consideration of sentence. After all, in 1988, it was only when the State opted to tell the jury about such proceedings that its decision had been called into question.

The Fourth Circuit accurately observed that this Court eventually held in *Simmons* that the State must disabuse a jury of its misconceptions regarding parole by affirmatively instructing it on state parole law, yet had held in *Caldwell* in 1985 that it was a "choice" of State "policy" as to whether to correct jurors' "misconceptions" about the State's appellate power or processes. (JA 257). A jurist considering O'Dell's claim in 1988 that he was

entitled to correct what he believed to be the jury's possible misapprehension of his parole status by an affirmative instruction on Virginia's parole law, quite reasonably could have read *Ramos* and *Caldwell* as authority upholding Virginia's policy decision not to instruct juries about parole.

c. Lower court decisions

While no decision in 1988 had held it unconstitutional to refuse to instruct a jury about parole, the cases upholding the specific practice as constitutional were abundant. The Fourth Circuit, in 1985, had held as follows:

> In arriving at its decision [in *Ramos*], the Court noted: "[o]ur conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their state should not be permitted to consider the governor's power to commute a sentence.[30]" In footnote 30 the Court stated that "[m]any state courts have held it improper for the jury to consider or to be informed - through argument or instruction - of the possibility of commutation, pardon, or parole." . . . While not exactly on point, ***we think Ramos indicates that the Court would decide that while it is constitutionally permissible to instruct the jury on the subject of parole, such an instruction is not constitutionally required. We so hold.***

Turner v. Bass, 753 F.2d 342, 354 (4th Cir. 1985) (emphasis added), *rev'd on other grounds*, 476 U.S. 28 (1986).

In 1983, the Fifth Circuit had held as follows:

> [W]e cannot say that an instruction on parole is constitutionally mandated in a capital case. *See California v. Ramos* . . . (instruction informing jurors in capital case that governor has power to commute "life sentence without possibility of parole" but not informing them of equivalent power to commute death sentence not unconstitutional).

O'Bryan v. Estelle, 714 F.2d 365, 389 (5th Cir. 1983), *cert. denied*, 465 U.S. 1013 (1984); *see also King v. Lynaugh*, 850 F.2d 1055, 1057 (5th Cir. 1988) (*en banc*) (reaffirming prior ruling in *O'Bryan* and rejecting claim of entitlement to question prospective jurors about possible "misconception" about Texas parole law, deeming the "logic" of King's request "absurd" and "its legal support" "even thinner."), *cert. denied*, 488 U.S. 1019 (1989).

Both the Fourth and Fifth Circuit rules, moreover, continued in force well ***after*** this Court decided *Skipper*. *See Peterson v. Murray*, 904 F.2d 882, 886-87 (4th Cir.) ("[W]e believe that *Ramos* left to the states the decision concerning what, if anything, a jury should be told about commutation, pardon, and parole."), *cert. denied*, 498 U.S. 992 (1990); *Knox v. Collins*, 928 F.2d 657, 660, 662 (5th Cir. 1991) (rejecting claim "that the Constitution mandates instruction on parole in capital cases" because "[t]he decision whether to require such an instruction rests entirely with the state legislature"); *see also United States v. Chandler*, 996 F.2d 1073, 1086 (11th Cir. 1993) (district court not required to tell jury range of possible sentences other than death, including life without parole, because the sentences were not mitigating factors under *Lockett or Skipper*), *cert. denied*, 114 S.Ct. 2724 (1994).

The Virginia Supreme Court repeatedly had held that "it [is] the jury's duty to assess the penalty, irrespective of considerations of parole." *Poyner*, 329 S.E.2d at 828; *see also Stamper*, 257 S.E.2d at 821 (expressly relied upon by

the trial court in denying O'Dell's request) (JA 250); *Williams v. Commonwealth*, 360 S.E.2d 361, 368 (Va. 1987) ("A reduced sentence is not the responsibility of the judiciary but of the executive department, and argument as to what that department might do encroaches upon the separation of their functions."), *cert. denied*, 484 U.S. 1020 (1988); *Turner v. Commonwealth*, 364 S.E.2d 483, 487-88 (Va.) (rejecting petitioner's argument that, under *Skipper* and *Ramos*, he should be entitled to present evidence on parole eligibility), *cert. denied*, 486 U.S. 1017 (1988).

The Virginia Supreme Court continued to rely on *Ramos* until this Court decided *Simmons*. *See Mueller v. Commonwealth*, 422 S.E.2d 380, 394 (Va. 1992) ("This Court has held uniformly and repeatedly that information regarding parole eligibility is not relevant for the jury's consideration. Further, the United States Supreme Court has expressly left the determination of this question to the individual states. . . . "), *cert. denied*, 507 U.S. 1043 (1993).

Of course, *Ramos* itself recited the widespread authority throughout the country for the practice Virginia employed. *See Ramos*, 463 U.S. at 1013 n.30; *id.* at 1021 n.5 and 1027 n.13 (Marshall, J., dissenting). And, the opinions in *Simmons* itself acknowledged that in 1994, the practice of disallowing instruction on parole was anything but confined to Virginia. *See Simmons*, 512 U.S. at 168 n.8 (plurality opinion) (Pennsylvania and South Carolina had same rule as Virginia); *id.* at 179 n.2 (Scalia, J., dissenting) (Texas and North Carolina prevented information about number of years before a defendant is eligible for parole).

While fully mindful of the rule that denials of petitions for certiorari hold no precedential value, it cannot be denied that state Supreme Courts are aware of the

particular scrutiny their direct appeal decisions in capital cases receive. In the context of the new rule's "legal landscape" inquiry, this Court's repeated denials of certiorari petitions in which capital defendants expressly complained about the constitutionality of Virginia's rule barring instruction on parole certainly would not have gone unnoticed, and could have been considered by a reasonable state court as some measure of assurance that its no-parole-instruction rule was not unconstitutional. *See, e.g., Peterson v. Virginia*, No. 87-5256, *cert. denied*, 464 U.S. 865 (1983); *Eaton v. Virginia*, No. 90-7054, *cert. denied*, 502 U.S. 824 (1991); *Yeatts v. Virginia*, No. 91-7178, *cert. denied*, 503 U.S. 946 (1992); *King v. Virginia*, No. 92-5169, *cert. denied*, 506 U.S. 957 (1992); *Jenkins v. Virginia*, No. 92-7669, *cert. denied*, 507 U.S. 1036 (1993). *See also Sawyer*, 497 U.S. at 237 (evidence that *Caldwell* was not dictated by prior law seen in *Maggio v. Williams*, 464 U.S. 46 (1983), where the Court merely had vacated a stay of execution but Justice Stevens' concurrence described a *Caldwell*-like claim as being the basis for the stay); *Gilmore v. Taylor*, 508 U.S. 333, 344 n.3 (1993) ("The existence of . . . an institutionalized state practice over a period of years is strong evidence of the reasonableness of the interpretations given existing precedent by state courts."). Of course, as discussed above, O'Dell's two prior certiorari petitions in this Court also each specifically urged this Court to ***adopt*** the position that Virginia's rule denied due process.

Butler's admonition, that the reasonableness of a court's decision is directly related to how "debatable" it was as evidenced by "the differing positions taken" by the lower courts, is dispositive of O'Dell's case. *See Butler*, 494 U.S. at 415. In 1988, no court agreed with his position and every court to address it agreed with Virginia. It is

impossible to conclude that the rule in *Simmons* was dictated by precedent existing in 1988.

3. A reasonable jurist could have distinguished O'Dell's claim from *Gardner* and *Skipper*.

Justice O'Connor stated in her concurrence in *Wright v. West*, 505 U.S. at 304, that "[t]o determine what counts as a new rule, *Teague* requires courts to ask whether the rule a habeas petitioner seeks can be meaningfully distinguished from that established by binding precedent at the time his state court conviction became final." An apparent and "meaningful" distinction between the rule in *Simmons* and the rules in *Gardner* and *Skipper* was suggested in *Simmons* itself.

In Justice O'Connor's controlling opinion, she restated the holding of *Skipper* – that a defendant must be allowed to present evidence "to deny or explain" the prosecution's evidence of future dangerousness – and then recited the facts in Simmons' case: the prosecution argued that Simmons was a vicious predator who would pose a cor inuing threat to society and Simmons' response was that "he only preyed on elderly women" and thus would not be dangerous if kept in prison. *Simmons*, 512 U.S. at 175-76. Justice O'Connor then stated as follows:

> ***Unlike in Skipper***, where the defendant sought to introduce ***factual*** evidence tending to disprove the State's showing of future dangerousness, . . . petitioner sought to rely on the operation of South Carolina's sentencing ***law***. . . .

Id. at 176 (emphasis added).

Both *Gardner* and *Skipper* dealt with the exclusion of factual evidence about the defendant's good character, his record or the circumstances of the offense. Such factual evidence fit squarely within the parameters this Court had established for capital sentencing proceedings in *Lockett* and *Eddings*.

A court, however, looking at O'Dell's claim in 1988, reasonably could have distinguished it from *Gardner* and *Skipper* because O'Dell was not asking to present factual evidence of his character, record or the circumstances of his crime in order to rebut the evidence of his dangerous nature, like the defendants in *Gardner* and *Skipper* had asked to do. O'Dell, rather, was asking for an instruction informing the jury, as a matter of state law, whether the State would enforce a sentence of life imprisonment. No case had held that due process required such an instruction and certainly no case before *Simmons* had held that a defendant was entitled to rely on state parole law as a form of "rebuttal" to the State's proof that the defendant had a violent, dangerous background. *Cf. Sawyer*, 497 U.S. at 236 ("It is beyond question that no case prior to *Caldwell* invalidated a prosecutorial argument as impermissible under the Eighth Amendment."). It would have been entirely reasonable in 1988 for the Virginia Supreme Court to have drawn this distinction between factual evidence on the one hand and the operation of state law on the other, just as in 1996 the Fourth Circuit saw the same distinction.

Indeed, this Court made just such a distinction in *Saffle* where the defendant relied on *Lockett* and *Eddings* for the proposition that he was entitled to an instruction that the jury must consider and give effect to emotions that are based on mitigating evidence. *Saffle*, 494 U.S. at

494. The Court rejected Parks' proposal as an impermissible new rule based on the "fact-law" distinction between *Lockett* (and *Eddings*) on the one hand and his proposal on the other. The Court pointed out that while *Lockett* and *Eddings* "define the factual bases" for a capital sentencing decision, they "do not speak directly, if at all, to [Parks' question of] whether the State may instruct the sentencer to render its decision on the evidence without sympathy." *Id.* at 490. The Court held as follows:

> Parks asks us to create a rule relating, not to ***what*** mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to ***how*** it must consider the mitigating evidence.

Id. (Emphasis in original). As the Fourth Circuit held, "a jurist in 1988 could reasonably have distinguished *Gardner*'s and *Skipper*'s rule as to the defendant's right to rebut prosecution claims with ***factual*** evidence, from *Ramos*' rule (and *Simmons*' rule) as to the defendant's right to rebut prosecution claims with arguments from state ***law***." (JA 260). And, of course, a court reasonably could have believed that, not only did *Gardner* and *Skipper* not compel a parole instruction, but *Ramos* expressly left such matters up to the discretion of the States.

D. The Rule In *Simmons* Was New.

In *Sawyer*, the Court found support for its conclusion that the rule in *Caldwell* was debatable, and therefore new, in the fact that three Justices dissented from the holding of the Court in *Caldwell*. 497 U.S. at 236-37. Similarly, in *Simmons*, two Justices believed that "[t]here is really no basis" for "a determination that any capital

sentencing scheme that does ***not*** permit jury consideration of . . . [parole ineligibility] is so incompatible with our national traditions of criminal procedures that it violates the Due Process Clause of the Constitution of the United States." *Simmons*, 512 U.S. at 178 (Scalia, J., dissenting, joined by Thomas, J.) (emphasis in original).

In *Butler*, the Court found support for its conclusion that the rule in *Arizona v. Roberson*, 486 U.S. 675 (1988), was debatable, and therefore new, in the fact that the Circuit Courts of Appeals had disagreed over whether the rule in *Roberson* was required by the Constitution. 494 U.S. at 415. Here, the differing views of the Fourth Circuit judges constitute the sum total of disagreement among Circuit Courts on the *Simmons* issue. Contrary to O'Dell's disingenuous assertion that "[e]very federal court that has addressed the issue, except the court of appeals here, has agreed" that *Simmons* was compelled by *Gardner* and *Skipper*, in fact the only judges who agree with O'Dell's position are the six Fourth Circuit dissenters below, the district court judge below and two other district court judges who did not even mention *Ramos* in their opinions.[12]

The great weight of current authority on the issue of whether *Simmons* is a new rule comes down on the side of the Commonwealth of Virginia and the court below. *See Stewart v. Lane*, 70 F.3d at 958 n.3; *Johnson v. Scott*, 68 F.3d

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[12] Neither *Carpenter v. Vaughn*, 888 F. Supp. 658 (M.D. Pa. 1995), nor *Spreitzer v. Peters*, 1996 U.S. DIST. LEXIS 1189 (N.D. Ill. Feb. 5, 1996), mentions *Ramos* in its conclusion that *Simmons* was not a new rule. *Spreitzer*, moreover, is contrary to its own circuit precedent finding that *Simmons* is a new rule. *See Stewart v. Lane*, 70 F.3d 955, 958 n.3 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 2580 (1996).

106, 111-112 n.11 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 1358 (1996); *Mueller v. Murray*, 478 S.E.2d 542, 548 (Va. 1996); *Commonwealth v. Christy*, 656 A.2d 877, 888-889 (Pa.), *cert. denied*, 116 S.Ct. 194 (1995). Of course, the courts' differing opinions on the matter only reinforce the fact that the rule was susceptible to debate among reasonable minds and, thus, not one that was "dictated" by prior precedent.

Another factor that certainly is at least a strong indication of what reasonable minds thought about the state of the law before *Simmons* was decided is the actual requests which both Simmons and O'Dell made to this Court. Jonathan Dale Simmons argued quite explicitly for a change in the law:

> In *California v. Ramos*, 463 U.S. 992 (1983), the Court noted that many states prohibit capital sentencing juries from considering the availability of parole, pardon or commutation. 463 U.S. at 1013 n.30. ***These state law rules developed in an era when release on parole was widely available for life-sentenced murderers. . . . In recent years, however,*** with the steady expansion of "life without parole" statutes, parole for life-sentenced murderers has increasingly moved from a real possibility to a jury-room myth, unfounded in reality but ever-present in the deliberations of capital sentencing juries. ***And with this change, rules that once protected capital defendants from potentially harmful speculation now serve to increase the danger of death sentences based on jurors' misinformed fear of parole release.***

Brief for ~~Petit~~ioner Simmons, No. 92-9059 at 16-17 (emphasis added). *See also Simmons*, 512 U.S. at 177 (O'Connor, J., concurring) ("The rejection of parole by

many States (and the Federal Government) is a ***recent development*** that displaces the longstanding practice of parole availability . . . and common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole.") (emphasis added).

O'Dell, too, quite clearly urged this Court to create a new rule of constitutional law in his certiorari papers filed on direct appeal and state habeas corpus appeal. (See above at pp. 4-5). Certainly, the proponents' recognition of the novelty of their own position at the very least supports the view that a reasonable jurist in 1988 could have believed the position was not constitutionally commanded.

Finally, this Court's new rule cases themselves lead to the inescapable conclusion that *Simmons* was a new rule. In *Butler*, the Court refused to hold that its decision in *Roberson* was dictated by prior precedent even though, on both the facts and the law, *Roberson* was extremely close to *Edwards v. Arizona*, 451 U.S. 477 (1981). The decision in *Butler* led Justice Brennan to conclude in dissent that a state court decision must stand unless it is "clearly erroneous" or "patently unreasonable." *Butler*, 494 U.S. at 422-423 (Brennan, J., dissenting).

In *Sawyer*, the Court refused to hold that its decision in *Caldwell* was dictated by precedent even though a prior case had warned that prosecutorial argument could result in a violation of due process. *See Sawyer*, 497 U.S. at 235 (referring to *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). *Sawyer* specifically looked to *Ramos* as authority that reasonable jurists could have relied upon, ***even though that "characterization of Ramos . . . later proved to be incorrect."*** *Sawyer*, 497 U.S. at 237 (emphasis

added). If *Ramos* reasonably could have been read to give States discretion over whether to tell juries about appellate review, *see Sawyer*, then there is far more force to the argument that *Ramos* reasonably could have been read to give States discretion over whether to tell juries about parole procedures ***because Ramos expressly said so***.

O'Dell's argument that "*Ramos* and *Simmons* are . . . entirely consistent" (Pet. Br. at 22) simply ignores the obvious. While it is true that *Simmons* did not expressly overrule *Ramos*, it undeniably carved out an exception to *Ramos'* general rule of deference. Justice O'Connor's concurrence all but spelled it out: *Ramos* recognized that many state courts do not allow instruction or argument about parole, but, henceforth in cases where (1) the State seeks to prove the defendant's future dangerousness and (2) the defendant would be parole-ineligible on a life sentence, the State must allow the very instruction it previously had the discretion to deny. *Simmons*, 512 U.S. at 176-177. Clearly, if *Simmons* is applied retroactively, it will call into question the validity of numerous state court judgments which had relied, in good faith, on this Court's express approval of procedures that were not found unacceptable until years later.

The new rule doctrine was created to avoid the sort of unfair result O'Dell seeks for himself. As the Fourth Circuit found, "*Simmons* was the paradigmatic 'new rule.' " (JA 224). This Court should decline O'Dell's invitation to erode a doctrine that upholds state court decisions which were reasonably made in good-faith adherence to the law as articulated by this Court at the time the decisions were made.

II

SIMMONS IS NOT A WATERSHED RULE OF CRIMINAL PROCEDURE.

In order to hold that *Simmons* was a new rule that nevertheless should be applied retroactively to cases on collateral review, this Court would have to rewrite the settled standard under which such exceptions are made. O'Dell argues that the *Simmons* new rule falls under the second *Teague* exception because the "practice condemned in *Simmons* is a shocking one" and because parole evidence is so "relevant" as to be "essential." (Pet. Br. at 33-34). In order for this Court even to reach the question of whether or not *Simmons* fits *Teague*'s second exception, however, it necessarily will have determined that *Simmons* announced a rule that was not dictated in 1988, and that the Virginia Supreme Court's decision was reasonable under then-existing precedent. Thus, O'Dell's "shocking" standard simply has no place in an analysis of the *Teague* exceptions: Virginia's practice in 1988 was not erroneous or unreasonable, much less "shocking."

This Court never has found a new rule to meet the second exception. Justice O'Connor's opinion for the plurality in *Teague* made clear that the exception is one reserved for "watershed rules of criminal procedure" which are "absolute prerequisite[s] to fundamental fairness." *Teague*, 489 U.S. at 311, 314. In *Saffle*, Justice Kennedy wrote for the Court that the type of "watershed rule" that meets the second exception is one on a par with the rule in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See Saffle*, 494 U.S. at 495. And, again speaking for the Court in *Sawyer*, Justice Kennedy wrote as follows:

> [i]t is . . . not enough under *Teague* to say that a new rule is aimed at improving the accuracy of

> trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also " 'alter our understanding of the ***bedrock procedural elements***' " essential to the fairness of a proceeding. [Quoting *Teague*, 489 U.S. at 311].

Sawyer, 497 U.S. at 242 (emphasis in original). In *Graham*, the Court made clear that, "[w]hatever the precise scope of this exception, it is clearly meant to apply only to a small core of rules requiring 'observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.' " ' " *Graham*, 506 U.S. at 478, *quoting Teague*, 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

The rule in *Simmons* meets none of the requirements for the exception. *Simmons* requires the State to inform the jury, upon the defendant's request, that the defendant will be ineligible for parole so as to disabuse jurors of the possible notion that if it sentences him to life imprisonment, he will be released into society. *See Simmons*, 512 U.S. at 177 (O'Connor, J., concurring). The rule has none of the "primacy and centrality" of the rule in *Gideon*. *See Saffle*, 494 U.S. at 495.

Like the new rule in *Caldwell*, the rule in *Simmons* is aimed at correcting a possible misimpression of the jury and "must therefore be read as providing an additional measure of protection against error, beyond that afforded" already in the sentencing proceeding by *Gardner*, *Skipper*, *Clemons* and *Crane*. *See Sawyer*, 497 U.S. at 244. Thus, like the rule in *Caldwell*, the rule in *Simmons* was designed to enhance the capital sentencing process

by providing the defendant with, in essence, an additional defense to the State's argument for death: that his dangerousness will be kept in check through confinement. That new rule of criminal procedure is not an "absolute prerequisite to fundamental fairness;" neither does it "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Teague*, 489 U.S. at 314; *Sawyer*, 497 U.S. at 242.

The rule in *Simmons* is no more entitled to exceptional status than the rule in *Caldwell* or the jury instructions sought in *Saffle* and *Graham*. It simply is not the "groundbreaking occurrence" needed to satisfy the second *Teague* exception. *See Caspari*, 510 U.S. at 396.

III

THE *SIMMONS* ERROR HAD NO SUBSTANTIAL AND INJURIOUS EFFECT.

The Fourth Circuit did not reach the issue of whether the *Simmons* error in O'Dell's case was harmless because it found that O'Dell was not entitled to the benefit of the rule in *Simmons*. (JA 278). The Court nevertheless found "strong indications that even if it had been error, it would have been harmless under *Brecht*, given the heinousness of the crime, O'Dell's lengthy and frightening criminal record, and O'Dell's own testimony from the stand that he would spend the rest of his life behind bars." (*Id.*). The Fourth Circuit's conclusion was correct.

Federal habeas corpus relief is unavailable unless trial error actually prejudiced the capital defendant's case. *Brecht*, 507 U.S. at 637. The error must have "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* Here, there are strong indications that the refusal to instruct the jury that O'Dell never

would be eligible for parole had ***no*** effect, much less a substantial or injurious one. First and foremost, O'Dell's "lengthy and frightening" criminal record included a murder that he had committed against another inmate ***while he was imprisoned***. (JA 46-47). The jury thus knew that O'Dell's "future dangerousness" could not be prevented even if he never was paroled.

Second, the jury sentenced O'Dell to death based not only on its finding that he would constitute a danger in the future, but also based on its finding that his premeditated murder in the commission of rape was "outrageously wanton, vile or inhuman and [that] it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." (JA 69).[13] To say that O'Dell's monstrous acts were "beyond the minimum necessary" is a gross understatement. O'Dell raped and sodomized Helen Schartner. He bashed her head repeatedly with his gun. He strangled her with such ferocity that he literally broke her neck. The "vileness" issue was not even close and the jury had overwhelming reason to sentence O'Dell to death that was completely independent from any consideration of his future dangerousness. *See Tuggle v. Netherland*, 79 F.3d 1386, 1393 (4th Cir.) (strong evidence of aggravating factor independent of factor called into question by error weighs in favor of harmlessness), *cert. denied*, 117 S.Ct. 237 (1996); *see also Zant v. Stephens*, 462 U.S. 862, 884 (1983).

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[13] On direct appeal, the Virginia Supreme Court mistakenly characterized the verdict as based only on "future dangerousness." (JA 108). The Fourth Circuit recognized this mistake, as did O'Dell in the appeal below. (JA 278). The record unquestionably shows that the jury found both aggravating factors. (JA 69).

Third, contrary to O'Dell's mischaracterization, his prosecutor did not "dwell" on O'Dell's parole history or argue that "only a death sentence could prevent his being paroled to kill again." (Pet. Br. at 30). O'Dell's poor parole performance, indeed, was before the jury, but only because O'Dell introduced it during his cross-examination of Donna Doyle (JA 32-33) and during his own testimony. (JA 50-52).[14] And, to be sure, the prosecutor argued that a death sentence was the only sentence that would stop O'Dell's violent acts. (JA 66). But the prosecutor's argument, unlike that in *Simmons*, did not assert, or even imply, that a death sentence was needed to prevent a possible parole. Indeed, O'Dell's prosecutor did not need to argue the threat of parole because O'Dell's record of murder behind bars demonstrated that nothing would stop O'Dell's violent acts except his execution.

Fourth, although O'Dell was not allowed to instruct the jury that he never would be eligible for parole, he told the jury in his sworn testimony, and without contradiction, that due to his prior convictions, he was "never going to get out." (JA 55).

Finally, unlike the jury in *Simmons* that obviously was concerned about the defendant's parole eligibility on a life sentence, as was evidenced by their question about parole, *see Simmons*, 512 U.S. at 178, O'Dell's jury asked no questions and returned its verdict in little more than one hour. (JA 68). There thus is no indication that O'Dell's jury harbored any interest in his future parole

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[14] The prosecutor introduced conviction orders from O'Dell's prior offenses (JA 12-16) as well as the testimony of Donna Doyle who described O'Dell's robbery and kidnapping of her in Florida. (JA 17-32).

status, much less even the slightest hesitancy or doubt about its verdict. Under these circumstances, the Court can be confident that the lack of an instruction regarding O'Dell's parole status had no substantial and injurious effect on the jury's sentencing determination.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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RESPONDENT'S APPENDIX

No. 95-8836

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

ELLIS WAYNE FELKER, PETITIONER

v.

TONY TURPIN, WARDEN, RESPONDENT

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit and on
Petition for a Writ of Habeas Corpus

BRIEF FOR SENATOR ORRIN G. HATCH, SPEAKER NEWT GINGRICH, CONGRESSMEN DICK ARMEY, TOM DeLAY, HENRY HYDE, SENATORS STROM THURMOND, CHARLES GRASSLEY, FRED THOMPSON, JON KYL, SPENCER ABRAHAM, CONGRESSMEN BILL McCOLLUM, GEORGE W. GEKAS, CHARLES T. CANADY, BOB INGLIS, SONNY BONO, FREDERICK K. HEINEMAN, ED BRYANT, SENATORS JOHN ASHCROFT, ROBERT F. BENNETT, THAD COCHRAN, ALFONSE D'AMATO, LAUCH FAIRCLOTH, BILL FRIST, JAMES INHOFE, TRENT LOTT, DON NICKLES, HARRY REID, RICK SANTORUM, RICHARD C. SHELBY, BOB SMITH, AND JOHN W. WARNER, AND CONGRESSMEN WAYNE ALLARD, RICHARD H. BAKER, BOB BARR, JOE BARTON, DOUG BEREUTER, JOHN BOEHNER, BILL K. BREWSTER, JON CHRISTENSEN, TOM A. COBURN, CHRISTOPHER COX, BILL EMERSON, PHIL ENGLISH, MEL HANCOCK, JAMES V. HANSEN, STEPHEN HORN, TIM Y. HUTCHINSON, ERNEST J. ISTOOK, JR., STEVE LARGENT, FRANK D. LUCAS, RON PACKARD, NICK SMITH,

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* * *

3. The Act also codifies and strengthens the deference standard adopted in *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* held that federal courts cannot grant relief to a state prisoner by adopting a "new rule" of law when adjudicating a habeas corpus petition, and "[a] new rule for *Teague* purposes is one where "the result was not dictated by precedent existing at the time the defendant's conviction became final.' " *Goeke v. Branch*, 115 S.Ct. 1275, 1277 (1995) (quoting *Caspari v. Bohlen*, 114 S.Ct. 948, 953 (1994), quoting in turn *Teague*, 489 U.S. at 301 (plurality

opinion) (emphasis deleted in *Goeke*)) *see also, e.g., Graham v. Collins*, 113 S. Ct. 892, 897 (1993).[31]

* * *

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[31] The relevant question under *Teague* is "whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." *Goeke*, 115 S.Ct. at 1277 (quoting *Caspari v. Bohlen*, 114 S.Ct. at 953, quoting in turn *Saffle v. Parks*. 494 U.S. 484, 488 (1990); *Gilmore v. Taylor*, 113 S.Ct. 2112, 2116 (1993); *Butler v. McKellar*, 494 U.S. 407, 412 (1990). "The new rule principle validates reasonable, good-faith interpretations of existing precedents made by state courts and thus effectuates the States" interest in the finality of criminal convictions and fosters comity between federal and state courts." *Gilmore*, 113 S.Ct. at 2116 (quoting *Butler*, 494 U.S. at 414; internal punctuation omitted). A claim that government conduct was "arbitrary," "conscience-shocking," or "interferes with fundamental rights" is insufficient. *Goeke*, 115 S.Ct. at 1277; *see also Gilmore*, 113 S.Ct. at 2118-19. To show that existing precedent "dictated" a ruling in his favor, an inmate must prove that clearly established law left the courts with no alternative except to enter judgment in his favor. *Id.*

No. 96-5658

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

CARY MICHAEL LAMBRIX,

Petitioner,

v.

HARRY K. SINGLETARY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF THE CRIMINAL JUSTICE LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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III. Disapproval of previously approved practices contributes to the very problem Furman and its progeny set out to cure.

For three decades now, the American people have trudged the switchback trail of capital punishment jurisprudence. In their quest for a real, enforced death penalty for the very worst murderers, they have been led first one direction, then the opposite, based on conflicting signals of what the Constitution is supposed to require.

* * *

A murderer should be executed or spared depending on the crime he committed, his previous crimes if any, and any mitigating facts of his background. Execution should not be a function of whether the legislature and judiciary of the state correctly predicted the next three twists in the switchback trail of capital punishment jurisprudence. Yet that is largely the situation today, when the lower courts must grapple with a body of law which has become "enormously complex . . . , posing issues which often defy clear or even sound resolution." *Flamer v. Delaware*, 68 F.3d 736, 764 (1995) (Lewis, J., dissenting).

The tangled thicket of case law not only causes arbitrary execution of the penalty, it also causes extended delay in the cases that are finally executed.

"There are powerful reasons for concluding capital cases as promptly as possible. Delay in the execution of

judgments imposing the death penalty frustrates the public interest in deterrence and eviscerates the only rational justification for that type of punishment.[1]

* * *

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[1] "*See, e.g.*, Judge Alex Kozinski [& Sean Gallagher], Death: The Ultimate Run On Sentence, 46 CASE WEST. RES. L. REV. 1, [4] (Fall 1995) ('Whatever purposes the death penalty is said to serve – deterrence, retribution, assuaging the pain suffered by the victims' families – these purposes are not served by the system as it now operates.'); Justice Lewis Powell, Commentary: Capital Punishment, 102 HARV. L. REV. 1035, 1035 (1989) ('Years of delay between sentencing and execution . . . undermines the deterrent effect of capital punishment and reduces public confidence in the criminal justice system')." *Gomez v. Fierro*, 519 U.S. ___, No. 95-1830 (Oct. 15, 1996) (Stevens, J., dissenting) (slip op., at I).

(10)

No. 96-6867

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

J.D. NETHERLAND, Warden, Mecklenburg Correctional Center; RONALD J. ANGELONE, Director, Virginia Department of Corrections; JAMES S. GILMORE, III, Attorney General of the Commonwealth of Virginia; COMMONWEALTH OF VIRGINIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONER

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I.

THE COMMONWEALTH FAILS TO SHOW THAT *SIMMONS* ANNOUNCED A NEW RULE

A. The Commonwealth Wrongly Minimizes the Force of *Gardner* and *Skipper*

The Commonwealth seeks to demonstrate that the plurality opinion in *Simmons* was wrong in saying that the decisions in *Gardner* and *Skipper* "compel[led]" the *Simmons* result. It is true, as the Commonwealth argues, *see* Brief of Respondents ("Resp. Br.") 16, that the *Simmons* plurality's use of the verb "compel" is not dispositive; but it is powerful evidence of what reasonable jurists would have thought before *Simmons* was decided.[1] *See Yates v. Aiken*, 484 U.S. 211, 217 (1988) (relying on the language of this Court's decision as evidence that it did not announce a "new rule"). The verb "compel" is not one that the Members of this Court use carelessly. Our research discloses only four criminal cases (including *Simmons*) in the last forty years in which either a majority or plurality of the Court said that a decision was "compelled" by precedent. *See Simmons v. South Carolina*, 512 U.S. 154, 165 (1994) (plurality opinion); *Doyle v. Ohio*, 426 U.S. 610, 617 (1976); *United States v. Hale*, 422

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[1] Contrary to the Commonwealth's suggestion, we of course do not argue that the issue here is "whether a court reasonably could have fashioned the *Simmons* rule" or that "if [O'Dell] can prove that *Simmons* stated a reasonable position, then he is entitled to its benefits." Resp. Br. 13, 11. We agree with the Commonwealth that the issue is whether reasonable jurists "in essence, should have seen *Simmons* coming." Resp. Br. 15.

U.S. 171, 176 (1975); *Gerstein v. Pugh*, 420 U.S. 103, 117 (1975).[2]

In arguing that *Gardner* and *Skipper* did not compel the *Simmons* result, the Commonwealth seeks to show, in substance, that *Gardner* and *Skipper* were confusing cases with multiple opinions that a reasonable jurist would have had trouble understanding. Resp. Br. 17-24. But *Gardner* and *Skipper* were not confusing, though the Commonwealth labors long and hard to make them so. Their due process holdings were perfectly clear, and the conclusion that they compelled the *Simmons* result was inescapable to any reasonable jurist who considered the issue.

In looking for confusion and ambiguity in *Gardner*, the Commonwealth simply miscounts the votes, finding only four for *Gardner*'s due process holding and thus concluding that a reasonable jurist could have believed *Gardner* to be only an Eighth Amendment case. Resp. Br. 20. In fact, five Members of the Court agreed in *Gardner*

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[2] The Commonwealth contends that it is a mistake to "equate[] Justice O'Connor's use [in the *Simmons* concurrence] of the word 'requires' with 'compels' " because the word is used simply as a "restatement" of the "due process holding" of *Skipper*. Resp. Br. 16 n. 6. It is true that the concurrence was restating the *Skipper* holding, but the word "requires" was supplied by the *Simmons* concurrence. The *Simmons* concurrence states that where the prosecution relies on a prediction of future dangerousness in asking for the death penalty, the due process principle of *Gardner* and *Skipper* "*requires* that the defendant be afforded an opportunity to introduce evidence on this point." *Simmons*, 512 U.S. at 175 (O'Connor, J., concurring in the judgment) (citing *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986), and *Gardner v. Florida*, 430 U.S. 349, 362 (1977)) (italics added).

that the sentencing proceeding there violated the Due Process Clause. *See Gardner*, 430 U.S. 349, 362 (1977) (plurality opinion of Stevens, J., joined by Stewart and Powell, JJ.); *id.* at 364 (opinion of Brennan, J.); *id.* at 365 (Marshall, J., dissenting). Moreover, the Court's due process holding was not specifically limited to "secret reports:"

> We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.

Id. at 362 (plurality opinion). There was nothing obscure about the *Gardner* holding.

The due process holding in *Skipper* was unanimous and crystal clear. Footnote 1 of the majority opinion in *Skipper*, joined by six Justices, states:

> Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362, 97 S. Ct. 1197, 1207, 51 L.Ed.2d 393 (1977).

Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1986).

In the face of this language, it would have been impossible for a reasonable jurist to conclude, as the Commonwealth suggests, that *Skipper* was "limited to an

Eighth Amendment violation." Resp. Br. 23. It is true that the due process holding was stated in a footnote, but this is apparently because the due process aspect of *Skipper*, in contrast to the Eighth Amendment aspect, was neither difficult nor controversial. The concurring opinion of Justice Powell, joined by Chief Justice Burger and then-Justice Rehnquist, expressly stated the concurring Justices' agreement with the majority's footnote 1 – the only part of the majority opinion with which the concurrence did agree. *Skipper*, 476 U.S. at 9-10 (Powell, J., concurring in the judgment). It is hard to imagine a less confusing case than *Skipper* on the due process issue.

The Commonwealth argues that a reasonable jurist in 1988 would have understood the *Skipper* due process holding as limited to the precise facts of *Skipper* – an attempt by a capital defendant to rebut an accusation of future dangerousness by presenting evidence of prior good conduct in prison. Resp. Br. 23. But, as noted above, the *Skipper* Court did not state its holding so narrowly, and the Commonwealth suggests no good reason why such a narrow reading would have been reasonable. The Commonwealth does not and cannot suggest any coherent argument that would distinguish the facts present in *Simmons* and here – an attempt by a capital defendant to rebut an accusation of future dangerousness by presenting evidence that he will in fact be confined for the rest of his life – from the *Skipper* facts. *See Wright v. West*, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring in the judgment) (a decision does not announce a "new rule" if it "simply applie[s] a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case

law"). "[C]losely analogous" is a precise description of the relationship between the *Skipper* facts and those present in *Simmons* and here. *See also id.* at 308 (Kennedy, J., concurring in the judgment) (*Teague* does not bar "the application of an old rule in a novel setting").

A reasonable jurist in 1988 would not have failed to apply the rule of *Gardner* and *Skipper* to the *Simmons/O'Dell* situation. To see this clearly, suppose that *Simmons* itself had never been decided; suppose that today's legal landscape were identical with that of 1988. O'Dell's case would then present the question whether the prosecutor's conduct here – arguing to the jury that O'Dell was intolerably dangerous whenever paroled, while barring O'Dell from informing the jury that he could never *be* paroled – is reconcilable with the plain words of footnote 1 in *Skipper*. The answer to that question is no, and that answer would be apparent to any reasonable jurist.

B. The Commonwealth Misinterprets *Ramos*

The Commonwealth's attempt to obscure the significance of *Gardner* and *Skipper* is matched by its equally strained attempt to tease out of *Ramos* an endorsement of the practice condemned in *Simmons*.

The Commonwealth understandably does not assert, as did the court of appeals majority, that in light of *Ramos* reasonable jurists in 1988 would have thought it "all but a certainty that the rule of *Simmons* was not only not compelled, but forbidden." 95 F.3d at 1231-32. (J.A. 258.) The Commonwealth does maintain, however, that in *Ramos* this Court offered "***express approval*** of Virginia's rule."

Resp. Br. 27 (bold italics in original); *see also id.* at 7, 28 n.11.

This argument relies entirely on the following language in *Ramos*:

> Our conclusion is not intended to override the contrary judgment of state legislatures that capital sentencing juries in their States should not be permitted to consider the Governor's power to commute a sentence.[30] It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires. . . .
>
> [30] *See, e.g.*, Ga. Code Ann. § 17-8-76 (Michie 1982) (prohibiting argument as to possibility of pardon, parole, or clemency). Many state courts have held it improper for the jury to consider or to be informed – through argument or instruction – of the possibility of commutation, pardon, or parole. . . .

California v. Ramos, 463 U.S. 992, 1013 & n.30 (1983).

According to the Commonwealth, the effect of these "broad statements of deference . . . simply cannot be overstated." Resp. Br. 29. But it can be, and the Commonwealth does overstate it, considerably. This language comes nowhere near to "express approval" of "Virginia's rule" preventing a defendant from informing a capital sentencing jury of his parole ineligibility to rebut the prosecution's claim of future dangerousness. The language refers neither to future dangerousness, to the right of rebuttal, nor to parole *ineligibility* – a much more significant and unambiguous fact than the "possibility" of parole. It simply recognizes that, as the Court also said

in *Ramos*, the States have discretion to forbid discussion of possible post-conviction procedures, including parole, so long as they "do[] not violate any of the substantive limitations this Court's precedents have imposed on the capital sentencing process." *Ramos*, 463 U.S. at 1013; *see also id.* at 1001 ("Beyond the[] limitations . . . noted above, the Court has deferred to the State's choice of substantive factors relevant to the penalty determination. In our view, the Briggs Instruction does not run afoul of any of these constraints.").

Ramos itself identified the most obvious of these "substantive limitations" – the right of rebuttal recognized in *Gardner* – and carefully explained why the Briggs Instruction did not violate it. *Id.* at 1001, 1004. Thus, neither the language cited by the Commonwealth nor anything else in *Ramos* could have been thought to constitute "approval" of Virginia's practice of forbidding a capital defendant from rebutting a claim of future dangerousness by informing the jury that he is ineligible for parole.

The Commonwealth contends that *Ramos* recognized a right of rebuttal only where the jury is instructed by the court about the defendant's possible post-conviction release. According to the Commonwealth, *Ramos*

> simply held that, if the State elects to go down California's path [of permitting some instruction on post-conviction procedures], it must make sure (1) the instruction is accurate and (2) the defendant is not put in a position, like *Gardner*, where he has no opportunity to rebut the instruction's impact. A reasonable reading in 1988 of *Ramos'* discussion of *Gardner* is that if a

> State elects the safe path of not allowing any instruction on the issues of pardon or parole, *it need not worry about* Gardner's *requirement of rebuttal at all.*

Resp. Br. 28 n.11 (italics added). Far from "[a] reasonable reading" of *Ramos*, this is a nonsensical one – at least where, as here, the jury is led, not by instruction but by evidence and argument, to believe that the defendant will return to the community. In such a case, no reasonable jurist would have thought that a State's refusal to instruct the jury on post-conviction procedures could make *Gardner* a dead letter or obviate the defendant's need to "deny or explain" the State's evidence of future dangerousness. It is absurd to suggest that *Ramos* could validate what happened in the present case – where the prosecution repeatedly and vividly brought "parole" to the jury's attention and raised in closing argument the specter of O'Dell's potential violence "outside of the prison system," *see* Brief of Petitioner ("Pet. Br.") 2-3, and O'Dell was not permitted to inform the jury that his parole would be prohibited.

C. The Commonwealth Distorts the Lower Court Precedents

The Commonwealth again distorts the legal landscape of 1988 when it suggests that then-extant lower court decisions would have justified a reasonable jurist in upholding as constitutional the practice condemned in *Simmons*. Resp. Br. 34. The Commonwealth says that "the cases upholding the specific practice as constitutional were abundant." Resp. Br. 34. But the Commonwealth overlooks the fact that the "specific practice" at issue in

Simmons was the concealment from the jury "where the defendant's future dangerousness is at issue" of the fact that "state law prohibits the defendant's release on parole." *Simmons*, 512 U.S. at 156. This "specific practice" did not have the approval of appellate courts in any jurisdiction, except Virginia, at or after the time O'Dell's conviction became final.[3]

The only decision of the Virginia Supreme Court *prior* to the date O'Dell's conviction became final that is even arguably on point is *Poyner v. Commonwealth*, 329 S.E.2d 815, 836 (Va.), *cert. denied*, 474 U.S. 865 (1985). A reasonable jurist could not, however, have relied on *Poyner* because it was decided prior to *Skipper*, and because it was poorly reasoned. *Poyner* relied exclusively on dicta in

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[3] *Simmons* noted that only three states had a life-without-parole sentencing alternative to capital punishment, but refused to inform sentencing juries of that fact: South Carolina, Pennsylvania and Virginia. *Simmons*, 512 U.S. at 168 n.8 (plurality opinion). The South Carolina Supreme Court did not uphold this practice as constitutional in *Simmons*. Rather, it held – erroneously, as this Court later determined – that Simmons's jury had effectively been informed that he faced life without parole. *See State v. Simmons*, 472 S.E.2d 175, 178-79 (S.C. 1993), *rev'd*, 512 U.S. 154 (1994). The Pennsylvania Supreme Court did not address the precise *Simmons* issue because, under Pennsylvania law, future dangerousness is not a permissible aggravating factor. *See* 42 Pa. Cons. Stat. § 9711(d). A fourth state, Illinois, had abandoned the practice of refusing to disclose to the jury the possibility of life without parole prior to the time O'Dell's conviction became final. *See People v. Gacho*, 522 N.E.2d 1146 (Ill.), *cert. denied*, 488 U.S. 910 (1988). *Gacho*, while not precisely on point, foreshadowed *Simmons* by recognizing the unfairness of frightening jurors with the specter of a defendant's possible release, without disclosing that the defendant faced life without parole.

Hinton v. Commonwealth, 247 S.E.2d 704, 706 (Va. 1978) – a non-capital case in which the Virginia Supreme Court reversed the defendant's conviction because of the trial judge's error in attempting to explain Virginia's parole practice to the jury. In short, prior to the time O'Dell's conviction became final, there was no reasoned precedent anywhere contrary to the *Simmons* holding.

The lower-court decisions the Commonwealth relies on at pages 34-38 of its brief would have furnished a reasonable jurist in 1988 with no basis for reaching a result contrary to that in *Simmons*. Indeed, all of those decisions, apart from the Virginia Supreme Court decisions, are still, at least arguably, good law today – nearly three years after *Simmons* was decided.

Thus, *Turner v. Bass*, 753 F.2d 342 (4th Cir. 1985), *rev'd*, 476 U.S. 28 (1986), the first of the lower court decisions relied on by the Commonwealth, did not involve a defendant who was ineligible for parole. The defendant sought an instruction that he would be eligible for parole when "the prisoner's release will serve his interests and the interests of society." *Id.* at 353. *Simmons*, which expressly addresses only the situation where parole is prohibited by law, does not on its face overrule *Turner*. Similarly, *O'Bryan v. Estelle*, 714 F.2d 365 (5th Cir. 1983), *cert. denied*, 465 U.S. 1013 (1984), involved a defendant who would have been eligible for parole. The same was true in *King v. Lynaugh*, 850 F.2d 1055, 1062 (5th Cir. 1988) (eligible for parole after 20 years), *cert. denied*, 488 U.S. 1019 (1989); *Peterson v. Murray*, 904 F.2d 882, 886 (4th Cir.) (same), *cert. denied*, 498 U.S. 992 (1990); *Knox v. Collins*, 928 F.2d 657, 660 (5th Cir. 1991) (same). *United States v. Chandler*, 996 F.2d 1073, 1085-86 (11th Cir. 1993), *cert. denied*, 512 U.S. 1227 (1994), involved the federal sentencing scheme, under which the judge determines an alternative sentence only after the jury decides not to impose the death sentence. It may also be noted that *Turner* and *O'Bryan* were decided before *Skipper*, and so could not have led a reasonable jurist to believe that *Skipper* did not govern the *Simmons/O'Dell* situation;[4] and of the remaining cases the Commonwealth cites at pages 34-35 of its brief, all but *King* were decided after O'Dell's conviction became final, and so at that date could not have enlightened a reasonable jurist at all.

II.

THE COMMONWEALTH FAILS TO SHOW THAT THE SECOND *TEAGUE* EXCEPTION IS INAPPLICABLE

The Commonwealth contends that, so long as "Virginia's practice in 1988 was not erroneous or unreasonable" in light of then-existing precedent, whether it was "shocking" from the perspective of simple and basic fairness "simply has no place in an analysis of the *Teague* exceptions." Resp. Br. 45. The whole point of the second *Teague* exception, however, is that, even if a rule is "new,"

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[4] *See Spreitzer v. Peters*, 1996 WL 48585 (N.D. Ill. Feb. 5, 1996), holding that the *Simmons* rule was not new in light of *Skipper*, and distinguishing *Stewart v. Lane*, 70 F.3d 955, 958 n.3 (7th Cir. 1995), *supplementing*, 60 F.3d 296 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 2580 (1996), on the ground that the conviction in *Stewart* became final prior to *Skipper*. *Id.* at *4-*6. The *Stewart* court also noted this distinction, 60 F.3d at 302 n.4, but the Commonwealth overlooks it in saying that *Spreitzer* is "contrary to" *Stewart*. Resp. Br. 41 n.12.

it may nevertheless implicate "the fundamental fairness and accuracy of the criminal proceeding," *Saffle v. Parks*, 494 U.S. 484, 495 (1989), and "seriously diminish[]" "the likelihood of an accurate conviction," *Teague v. Lane*, 489 U.S. 288, 311-13 (1989), such that it ought to be applied to final state-court convictions.

The Commonwealth dismisses the "primacy and centrality" of the *Simmons* rule because it provides only "an additional defense to the State's argument" of future dangerousness, and "an additional measure of protection against error." Resp. Br. 46-47. The Justices who decided *Simmons*, however, had a different view. As noted in the *Simmons* concurrence, "the fact that he will never be released from prison will often be the *only* way that a violent criminal can successfully rebut the State's case" of future dangerousness. *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring in the judgment) (italics added). Where the prosecution seeks to establish the defendant's future dangerousness, no rule could have more "primacy and centrality" than the *Simmons* rule.

III.

THE *SIMMONS* ERROR WAS NOT HARMLESS

The Commonwealth argues that the *Simmons* error at O'Dell's trial was harmless, claiming that it had no "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The "burden" of showing harmlessness is on the Commonwealth in the sense that if the Court is in grave doubt about the effect of the error, the error is not harmless. *O'Neal v. McAninch*, 115 S. Ct. 992, 994 (1995).

The Commonwealth makes, in substance, two separate harmless error arguments. It says that (1) the jury's verdict on future dangerousness was unaffected by the *Simmons* error, and (2) the future dangerousness verdict was itself superfluous because the jury also found "vileness." Neither argument is sound.

A. The Verdict on Future Dangerousness Was Affected by the *Simmons* Error

The Commonwealth obviously did not think at the time of trial that the jury's fear that O'Dell might be paroled was "harmless" to O'Dell; the prosecution stressed the subject heavily, with the obvious purpose of doing O'Dell as much harm as possible. The Commonwealth claims that the prosecution "did not 'dwell' on O'Dell's parole history," Resp. Br. 49, but does not explain why it was necessary to use or elicit the words "parole" and "release" seventeen times in the sixteen pages of O'Dell's cross-examination. *See* Pet. Br. 2 & n.1. Nor does the Commonwealth explain, or even mention, the prosecutor's rhetorical question in closing argument: "Isn't it interesting that he is only able to be *outside of the prison system* for a matter of months to a year before something has happened again?" (J.A. 61) (italics added).

The Commonwealth argues that "O'Dell's prosecutor did not need to argue the threat of parole" because of O'Dell's "record of murder behind bars." Resp. Br. 49. The hypocrisy of this argument is blatant. In his closing argument, the prosecutor recounted in terrifying detail O'Dell's crimes *outside* of prison, but did not mention even once that O'Dell had been convicted in 1965 for

killing a fellow inmate. The prosecutor obviously knew what both common sense and empirical evidence confirm: nothing frightens a capital sentencing jury more, or is more likely to produce a sentence of death, than the likelihood of a defendant's return to the community.[5] And it is not at all probable that the jury was reassured by – or even believed – O'Dell's testimony that, because he was forty-four at the time of trial and "I got to do sixteen . . . years" for a "parole violation . . . I am never going to get out." *See* Resp. Br. 3.

Perhaps because the jury impact of possible parole in future dangerousness cases is overwhelming, no court anywhere, so far as we know, has held a *Simmons* error to be harmless. This case, in which "parole" was central to the prosecution's strategy for obtaining a death sentence, should not be the first.

B. The Vileness Verdict Did Not Render The Future Dangerousness Verdict Harmless

The Commonwealth argues that this is not just a future dangerousness case because the jury also found "vileness" as an aggravating factor. Resp. Br. 48. This argument is flawed for two reasons. First, as a matter of Virginia law, a vileness verdict will not be upheld when an accompanying future dangerousness verdict is invalid

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[5] *See Simmons*, 512 U.S. at 170 n.9 (plurality opinion) (collecting empirical evidence); Benjamin P. Cooper, Note, *Truth in Sentencing: The Prospective and Retroactive Application of* Simmons v. South Carolina, 63 U. Chi. L. Rev. 1573, 1573 n.2 (1996) (same).

under *Simmons*. Second, the Virginia Supreme Court has already in substance nullified the vileness verdict here.

In *Mickens v. Commonwealth*, 457 S.E.2d 9 (Va. 1995), the Virginia Supreme Court squarely rejected the Commonwealth's argument that a verdict of vileness makes *Simmons* error harmless. Mickens's death sentence, based on findings of both vileness and future dangerousness, had previously been affirmed by the Virginia Supreme Court on direct appeal. *Mickens v. Commonwealth*, 442 S.E.2d 678 (Va. 1994). This Court subsequently vacated that decision and remanded the case to the Virginia Supreme Court for reconsideration in light of *Simmons*. *Mickens v. Virginia*, 115 S. Ct. 307 (1994). On remand, the Virginia Supreme Court found that *Simmons* error had occurred, and did not find the error to be harmless, despite the existence of the vileness verdict. It directed a new trial on sentencing. 457 S.E.2d at 10. *Mickens* thus forecloses the Commonwealth from arguing that the *Simmons* error here was harmless.

Moreover, the vileness verdict in this case has been a dead letter for nine years. The Virginia Supreme Court, in affirming O'Dell's conviction and sentence, refused to consider his claim of error relating to the trial court's instruction on vileness, saying: "We need not rule on [it] because the jury did not base its verdict on the vileness predicate." 364 S.E.2d at 507. (J.A. 108.)

The Commonwealth now says that this statement was a "mistake[]." Resp. Br. 48 n.13. But when the Virginia Supreme Court's decision came down – when it seemed that the "mistake" would facilitate O'Dell's execution – the Commonwealth did not call the error to the

court's attention. And even now, in asking this Court in effect to correct the "mistake," the Commonwealth does not try to demonstrate that the vileness instruction given in O'Dell's case was proper. This by itself defeats this branch of the Commonwealth's harmless error claim. The vileness aggravator did not render the *Simmons* error harmless unless the verdict on vileness could have survived the appellate review it never received.

In any event, the Commonwealth's discovery of the Virginia Supreme Court's "mistake" comes far too late. The Commonwealth of Virginia, speaking through its highest court, determined in 1988 that O'Dell could be put to death on the basis of future dangerousness, and future dangerousness only. It is now clear that the determination cannot pass muster under the United States Constitution. The Commonwealth therefore invites this Court to review the decision of the Virginia Supreme Court to correct that court's "mistake," and permit the execution to proceed on a ground that the Virginia court never approved or reviewed. The Commonwealth's position is without precedent, and without support in fairness or logic.

CONCLUSION

For the foregoing reasons, and for those previously stated, the judgment of the court of appeals should be reversed, and the case remanded with instructions to grant the writ of habeas corpus.

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Respectfully submitted,

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